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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 469.

WASHINGTON, VIRGINIA AND MARYLAND COACH COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF ON BEHALF OF PETITIONER.

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OPINION BELOW.

The Opinion of the Circuit Court of Appeals is reported in 85 F. (2d) 990. It will be found in the Record at page 589.

JURISDICTION.

The decree of the United States Circuit Court of Appeals for the Fourth Circuit was entered October 8, 1936, (R. 598). The Petition for a Writ of Certiorari was filed herein October 17, 1936, and was granted October 26, 1936.

(R. 601.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended, and Section 10 (e) of the National Labor Relations Act, (29 U. S. C. A., Sec. 151).

STATUTE INVOLVED.

The National Labor Relations Act may be found at 29 U. S. C. A., Sec. 151; it is before this Court *in toto* as an Appendix to Petitioner's brief in *The Associated Press* v. *National Labor Relations Board,* No. 365 of the present term.

QUESTIONS PRESENTED.

Petitioner is an interstate bus company with eighty (80) employees. In December of 1935 after noticing growing inefficiency, increase in break-downs, disaffection, etc., the company determines to "clean house" and starts breaking in new bus drivers. In February of 1936 it finds out that a professional union organizer, disguised as a workman, has gotten a job with Petitioner under false pretenses and has "organized" the men. Rumors of sabotage increasing, the company on March 4, 1936, "cleans house", discharging 18 out of 57 union men, retaining, however, the President of the Union. The company proves the inefficiency of each individual discharged, though the Board refuses to allow the company to put in evidence their efficiency records. There is conflicting testimony that the company told several men they were discharged for union activities. The Board orders reinstatement with back pay, around $25,000 to date —to be paid Union men who haven't worked. On these facts the following questions are presented:

1. Is the Act as construed and applied to Petitioner a valid regulation of interstate commerce?

2. If the Act is declared unconstitutional as applied to local industry in the companion cases now before this Court, is it not unconstitutional as to Petitioner, the Act revealing a comprehensive plan to regulate all industry, intra-state as

well as interstate, and the one application being inseparable from the other?

OUTLINE OF ARGUMENT.

Contrary to the decision below, the law is that where, as here, a constitutional right is involved and the jurisdiction of the Court is at issue, the Courts can make their own independent determination of the facts.

On the facts, Petitioner has met the burden imposed by the Act (as construed by the Board) and has justified beyond a reasonable doubt its right to discharge the eighteen employees.

As to the law, the Act herein is unconstitutional as a regulation of both intra-state and inter-state commerce. To avoid burdening the Court, Petitioner will not repeat the arguments to this effect in the companion cases herein, but will devote the present Brief to discussing the possibility that the Act may be declared unconstitutional as to intra-state or local industries in one of the companion cases herein, in which event the question arises: if the Act is unconstitutional as to intra-state or local industries, is it's application to Petitioner, an inter-state bus company, separable or must the entire Act fall. As to this question of Inseparability, Petitioner's argument is:

(1) that it has the necessary standing to argue Inseparability; (2) that if the Act is unconstitutional as to intra-state or local industry, it is a nullity, the "Findings and Policy" and the Act itself disclosing objectives which could not possibly be achieved or even intelligently sought after, by application to Petitioner and other inter-state companies alone. Hence it's application to Petitioner would be for a purpose other than intended by the Act itself and the judgment below should be reversed.

STATEMENT OF FACTS.

Preliminary: The Board's Petition, the Order of the Board and the Decree of the Court Below:

The National Labor Relations Board, respondent herein, filed a petition in the Court below, the Circuit Court of Appeals for the Fourth Circuit, (R. 1), for the enforcement of its Order of May 21, 1936, requiring Petitioner to cease and desist from certain alleged unfair labor practices and further ordering it to take certain affirmative action, namely, offer re-employment to 18 discharged employees and make them whole for any loss of pay they had suffered by reason of the discharge, (R. 4). The Court below granted Respondent's Petition, (R. 598), and the present certiorari followed.

At the outset of the proceedings before the Board, Petitioner appeared specially and filed an objection to the jurisdiction of the Board asserting the unconstitutionality of the National Labor Relations Act on the same grounds as in the companion cases herein (R. 26-28) Being overruled Petitioner, without waiving its objection to the Board's jurisdiction, filed an Answer to the Board's Complaint, (R. 28).

Charges in the Board's Complaint:

The Board's complaint herein, (R. 19), resulted from a charge, (R. 9), and a supplemental charge, (R. 14), by Local No. 1079 Amalgamated Association of Street, Electric Railway and Motor Coach Employees. It alleges that Petitioner operates and controls motor bus transportation lines for the transportation of passengers and express from Washington, D. C., to various places in Virginia and Maryland and return; that in connection therewith it maintained a garage and repair shop in Clarendon, Virginia, wherein the busses are serviced and repaired, in the course of interstate transportation of passengers above referred to, (R. 20, Paragraphs 2 and 3); that these operations of Petitioner occurred in the course and current of commerce within the

District of Columbia and among the States and between the District and the States and are an integral part of the operations of an instrumentality of such commerce and constitute commerce among the States and between the Distict of Columbia and the States, (R. 20-21, Paragraph 4). It is then alleged that Petitioner discharged 21 employees, bus drivers and mechanics, and had refused to re-instate them, for the reason that they joined the labor union in question and engaged in concerted activities with other employees for the purpose of collective bargaining and other mutual aid and protection, (R. 21, Paragraph 6). By this action of Petitioner it is alleged Petitioner interfered with, restrained and coerced and presently was interfering with, restraining and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, and that by such acts Petitioner did thereby engage in and was thereby engaging in unfair labor practices within the meaning of Section 8, Subdivision 1 of the Act, (R. 22, Paragraph 7). It is also alleged the discharge of the men and the refusal to re-instate them constituted discrimination in regard to the hire and tenure of employment of the men, and that the Petitioner did thus discourage membership of the men in the labor union, and that this was likewise an unfair labor practice within the meaning of Section 8, Subdivision 3 of the Act, (R. 22, Paragraph 8).

The following is then alleged:

> "The aforesaid unfair labor practices of the respondent have occurred and are occurring in the course and current of commerce within the District of Columbia and among the States and between the District of Columbia and States of the United States and, on the basis of experience in the motor bus transportation and other industries, burden and obstruct such commerce and the free flow thereof, and have led and tend to lead to labor disputes burdening and obstructing such commerce and the free flow thereof, by impairing the efficiency, safety and operation of instrumentalities of such commerce." (R. 23, Paragraph 9.)

Petitioner's Answer to the Board's Complaint:

Without waiving its Constitutional objections asserted in its special appearance Petitioner in its Answer substantially admitted the allegations of the Complaint with respect to the nature of its business. It likewise admitted that it had discharged and refused re-instatement to the employees named in the Complaint but denied that it had done so because of their membership or activity in the union being formed, (R. 28-37). It stated that it had noticed growing inefficiency among the men since September of 1935 about which time a professional union organizer disguised as a workman obtained employment and began to organize the union. From that time on there was disaffection among the men, and the work did not seem to get done properly. The management thought that something out of the ordinary was occurring but was unable to locate what it was. It tried various remedial measures, but no permanent remedy was found. These conditions continued until about February 1, 1936, at which time the management determined that many of the employees were becoming so inefficient that it would be necessary to replace them in the near future. About February 1 it began to "break in" drivers to take the place of the six bus drivers who subsequently were discharged, and who are named in the Complaint. The management also held conferences early in February with a view to weeding out the less efficient employees in the repair shop. It was not until February 28 that the management discovered that a union was being formed. About this time a rumor got out that there was going to be a strike and various patrons telephoned or called wanting to know whether the service would be discontinued. Reports also were spread about that the brakes on the busses were faulty and there was danger that the drivers would lose control of the busses. Considering the entire situation the management determined around February 28 that drastic action must be taken and so concluded

to discharge the six bus drivers above referred to and to weed out the less efficient men in the repair shop. This was done.

Petitioner in its Answer reiterated its objections to the Constitutionality of the Act already filed with the Board and alleged that if under the above circumstances it was a violation of the Act to discharge the men, the Act as construed and applied constituted a deprivation of Petitioner's rights under the Due Process Clause of the Fifth Amendment, (R. 28-37).

The Board's Findings of Fact:

The Board found after a Hearing that Petitioner had illegally discharged 18 of the 21 mentioned, 4 being bus drivers and the remaining 14 mechanics and service employees, (R. 532, Finding 11 (1 to 18)) the object being to weed out the employees active in union affairs (R. 539). As to the shop employees it found that they constituted an integral part of petitioner's interstate transportation system, (R. 545, Finding 13). The Board found that the discharges constituted a discrimination in regard to the hire and tenure of employment within the meaning of Section 7 of the Act, and that, therefore, Petitioner was engaged in unfair labor practices within the meaning of Section 8, Subdivisions 1 and 3 of the Act, (R. 539, Finding 12).

Effect of the Unfair Labor Practices Upon Inter-State Commerce:

The Board found that the alleged unfair labor practices occurred in the course and current of inter-state commerce, (R. 545, Finding 13), and that on the basis of its experience in motor bus transportation Petitioner's conduct in discharging the 18 employees burdened and obstructed inter-state commerce, and led and tended to lead to labor disputes burdening and obstructing such commerce and the free flow thereof, by impairing the efficiency, safety and

operation of instrumentalities of commerce, (R. 546, Finding 14). Finally the Board found that Petitioner's alleged unfair labor practices affected commerce within the meaning of Section 8, Subdivisions 1 and 3 and Section 2, Subdivisions 6 and 7 of the Act, (R. 547, Paragraphs 3 and 4).

The Board's Order:

The Board ordered Petitioner to cease and desist: (a) from discouraging membership in the union by discrimination in regard to the hire and tenure of employment or any term or condition of employment; (b) from interfering with, restraining or coercing its employees in the exercise of their rights as guaranteed in Section 7 of the Act, (R. 548).

The Board further ordered Petitioner to offer to the 18 employees reinstatement to their former positions, with all rights and privileges previously enjoyed, and make such employees whole for any loss suffered by reason of their discharge, (R. 548).

Petitioner's Contentions in the Court Below:

In the Court below Petitioner undertook to prove from the record that every contention made in its Answer as to its reasons for discharging the employees in question was fully substantiated by the Record. It faced the Court with the practical problem of how an employer could exercise his right to discharge his employees about the time of the formation of a labor union. It asserted that on the facts in the present case it had a right "to clean house" at the time in question, and that any Act of Congress which was so interpreted by a Board in Washington that the burden of proof in connection with the discharges of the employees herein was thrust upon the employer such that he was required to show that the employees were *not discharged* because of their union activities operated to destroy the employer's right to discharge and thus deprived him of a substantial

right in violation of the Due Process Clause of the Fifth Amendment. Petitioner also analyzed the data with respect to the discharge of each individual employee and showed, we contend, ample reason for the discharge of every single one of them. It showed that only 20 of the 57 members of the union had been discharged, and that the President of the union was still in the Company's employ. It also complained of the Board's refusal to permit it to put into evidence the efficiency records of the various employees discharged and to compare these records with the efficiency records of the employees retained. The reason for the Board's refusal to permit this evidence was some sort of a notion on the part of the Examiner, (a member of the Board) that the efficiency records did not measure up to his standard of accuracy, and he did not know whether they had been kept properly or not. It was pointed out to him that it made no difference whether the records were accurate or inaccurate; that if as a result of these records the Company came to the conclusion that a state of inefficiency existed and later acted upon it, they were admissible to overcome the seeming presumption that the men were discharged because of union activities.

Petitioner also urged that the Act was unconstitutional as applied to the regulation of intra-state manufacturing activities and hence was unconstitutional as a whole, revealing as it did a comprehensive attempt to regulate all industry, intra-state as well as inter-state, and that the allegedly Constitutional application of the Act to inter-state commerce was inseparable from the seemingly unconstitutional application to purely intra-state industry.

BASIS OF DECISION OF THE COURT BELOW.

The Court below held that while the testimony on behalf of the employer "was not without weight", it could not be said that there was no substantial evidence to support the Board's findings, citing

Federal Trade Commission v. *Algoma Lumber Co.*, 291 U. S. 67, 73;
Helvering v. *Rankin*, 295 U. S. 123, 131;

to the effect that bearing in mind Section 10 (e) of the Act provides that findings of the Board as to facts if supported by evidence shall be conclusive, the above two cases prevented the Court from considering the testimony anew and making its own findings (R. 594, 592).

As to *Adair* v. *U. S.*, 208 U. S. 161, and *Coppage* v. *Kansas*, 236 U. S. 1, urged by Petitioner on the Constitutional questions, the Court held that these decisions had impliedly been overruled or distinguished by this Court's decision in *Texas and New Orleans R. Co.* v. *Railway Clerks*, 281 U. S. 548 (R. 594-596). As to Petitioner's contention that the Act applied not only to inter-state commerce but to local industry and being unconstitutional as to the latter was unconstitutional in its entirety, the Court below referred to its Opinion handed down the same day as the decision in the present case in *Foster Bros. Manufacturing Co.* v. *National Labor Relations Board*, 85 F. (2d) 984, wherein it held that Congress in the Act herein never intended to regulate intrastate commerce, the power conferred upon the Board in Section 10 (a) of the Act to prevent unfair labor practices being restricted to unfair labor practices "*affecting commerce*". Hence the Court held that there was no ground for Petitioner's argument that an important and inseparable part of the Act having been condemned the whole Act must fall, (R. 597-598).

SPECIFICATION OF ERRORS TO BE RELIED ON.

1. The Court erred in sustaining the National Labor Relations Act as a valid exercise of the power of Congress to regulate commerce as against Petitioner's claim it is in violation of the First and Tenth Amendments.

2. The Court erred in sustaining the constitutionality of the Act herein as against Petitioner's contention that the

Act was unconstitutional in that it improperly delegated judicial powers to the National Labor Relations Board.

3. The Court erred in sustaining the constitutionality of the Act herein as against Petitioner's contention that as construed and applied herein it deprives Petitioner of his liberty and property without Due Process of Law in violation of the Fifth Amendment.

4. The Court erred in sustaining the constitutionality of the Act herein as against Petitioner's claim that the Act, being unconstitutional as an attempted regulation of intra-state commerce, was likewise unconstitutional as a regulation of inter-state commerce, the provisions of the Act as to the two types of commerce being inseparable.

5. The Court erred in respect of Error Four above in holding that no question of separability was presented by reason of its theory, announced in *Foster Bros. Manufacturing Co.* v. *Board,* 85 F. (2d) 984, that Congress never intended the Act to apply to intra-state commerce.

6. The Court erred in sustaining the order of the Board holding that upon the evidence Petitioner was guilty of an unfair labor practice within the meaning of Section 8 of the Act.

7. The Court erred in sustaining the action of the Board in preventing Petitioner from submitting in evidence the efficiency records of the union men discharged, together with the efficiency records of the non-union men not discharged in order that a comparison between the two sets of employees might be made.

8. The Court erred in sustaining the action of the Board in thrusting upon Petitioner the burden of proof that the union employees discharged were *not discharged* for union activities.

9. The Court erred in sustaining the action of the Board in thrusting the burden of proof upon Petitioner that the union men discharged were discharged for good reasons as against Petitioner's claim that Petitioner had a constitutional right to discharge them for no reason at all, in contrast to a *good* reason.

10. The Court erred in requiring the re-instatement of the discharged employees with back pay, thus depriving Petitioner of its right to trial by jury, in violation of the Seventh Amendment and requiring Petitioner to offer to make a contract, for an indefinite period with the employees, in violation of the equitable principle that Courts cannot make or require the making of contracts and in any case will not require the specific performance of a personal service contract.

ARGUMENT.

Part I.

The Evidence Does Not Sustain the Findings.

A. Where a constitutional right is alleged to have been violated the federal courts can make their own independent determination of all questions of law and fact.

The Court below stated:

> "Section 10 (e) of the act provides that the findings of the Board as to facts, if supported by evidence, shall be conclusive. It is settled that in reviewing the findings of such a body, the court will not consider the testimony anew and make its own findings since the weight to be given to the evidence and the inferences to be drawn therefrom are matters for the fact finding body, and the function of the court in review is merely to reverse and modify such findings as have no evidence to support them and are clearly improper. *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73; *Helvering* v. *Rankin*, 295 U. S. 123, 131." (R. 592).

The Court apparently examined the Record from the basis of the above statement and the cases cited. It stated:

> "The testimony on behalf of the employer was not without weight, but it nevertheless appeared that the eighteen employees, all of them being union men, were discharged within a period of ten days after the first

step towards the formation of the union was taken, and within a week after the officials of the company received information thereof. During this period they were actively endeavoring to prevent the union movement and to persuade their employees from joining or continuing therein. When these efforts failed, the discharges followed. Under these circumstances it cannot be said that there was no substantial evidence to support the Board's findings, and consequently the petition of the Board cannot be dismissed for failure of proof." (R. 594.)

It is submitted that where the action of a partisan Board composed of laymen is alleged to be in violation of a person's constitutional rights the power of the Court to examine the facts is considerably broader than as stated in the *Algoma Lumber Company case, supra.* Thus in *Crowell* v. *Benson,* 285 U. S. 22, 60 this Court said:

"In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function. The case of confiscation is illustrative, the ultimate conclusion almost invariably depending upon the decisions of questions of fact. This court has held the owner to be entitled to 'a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts.' *Ohio Valley Water Co.* v. *Ben Avon,* 253 U. S. 287, 64 L. Ed. 908, P. U. R. 1920E, 814, 40 S. Ct. 527, supra. See also *Prendergast* v. *New York Telegraph Co.,* 262 U. S. 43, 50, 67 L. Ed. 853, 858, 43 S. Ct. 466; *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 74 L. Ed. 524, 50 S. Ct. 220, supra; *Phillips* v. *Commissioner of Internal Revenue,* 283 U. S. 589, 600, 75 L. Ed. 1289, 1299, 51 S. Ct. 608." (*Crowell* v. *Benson,* 285 U. S. at 60, 61).

A case of confiscation under the Fourteenth Amendment is no different in principle from one of outright usurpation under the Fifth. We know of no reason why, where an Act

is constitutionally assailed, utility companies should have a monopoly upon the Federal Courts' judicial examination either of facts tending to show jurisdiction in a Federal Board initially to act or facts necessary to be found to sustain the Board's action.[1] Certainly, as suggested in *Crowell* v. *Benson* above there can be no question of this Court's right to examine the facts in respect of confiscatory rates in utility cases. As recently as *St. Joseph Stock Yards Co.* v. *U. S.*, 298 U. S. 38, this Court reiterated the rule. In that case the District Court felt that it was bound to accept the findings of the Secretary of Agriculture on the question of confiscation, if such findings were supported by substantial evidence, and that it was not within the judicial province to weigh the evidence and pass upon the issues of fact. When the case came to be argued in this Court the Government's chief contention was, not that the District Court was right in this expression of the law, but that in spite of what the District Court said it had in fact made an independent examination of the facts. This Court in deciding the case drew a distinction between the scope of judicial review where the action assailed is within the scope of legislative authority, and action which transcends the limit of legislative power. In the first case the Court naturally does not sit as a board of revision to substitute its judgment for that of the Legislature or its agents as to matters within the province of either, and so when it appoints an agent to act within the sphere of legislative authority it may endow the agent with power to make findings of fact which are conclusive, assuming there is a fair hearing, etc. In such cases this Court said the judicial enquiry into the facts goes no further than to ascertain whether there is evidence to support the findings, the weight of the evidence being a matter for the administrative Board.

But, this Court said, the rate-making power is limited by the Constitution, which prohibits the deprivation of prop-

[1] See cases collected in Mr. Justice Brandeis' concurring Opinion in *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38.

erty without Due Process of Law. Upon such a charge the power of the Court to examine the evidence is entirely different. This Court said, and it is a strong and able statement:

> "Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded. It is said that we can retain judicial authority to examine the weight of evidence when the question concerns the right of personal liberty. But if this be so, it is not because we are privileged to perform our judicial duty in that case and for reasons of convenience to disregard it in others. The principle applies when rights either of person or of property are protected by constitutional restrictions. Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority. This is the purport of the decisions above cited with respect to the exercise of an independent judicial judgment upon the facts where confiscation is alleged." (St. Joseph Stock Yards Co. v. U. S., 298 U. S. 38).

We assert, therefore, without any further examination of the authorities that the Court below had power to make its independent examination of the testimony, and this Court has the same power. In the present case this question is not of any great complexity and so the chief objection noted in Mr. Justice Brandeis' concurring Opinion in *St. Joseph*

Stock Yards Co. v. *U. S., supra,* i.e., the magnitude of the task of judicial re-examination of facts, does not apply.

It may be noted that in *Bradley Lumber Co.* v. *National Labor Relations Board,* 84 F. (2) 97, 100 the Circuit Court of Appeals for the Fifth Circuit, contrary to the decision below, specifically held in a case similar to the present that the findings of the Board were subject "to a full judicial review".

The question, therefore, before this Court on the present record is whether, the union being composed of 57 employees, the discharge of 18 union men under the facts and circumstances of the case amounted to an unfair labor practice within the meaning of the Act, and whether the Act as construed and applied with respect thereto did not amount to a deprivation of Petitioner's rights under the Due Process Clause. If the present Record shows that the discharge of the 18 union men was not because of any union activities but a mere exercise of the normal right of discharge it follows that such discharges cannot constitute an unfair labor practice within the meaning of the Act, and hence the Act being construed by the Board and the Court below to penalize such a discharge has deprived petitioner of its right of freedom of contract or, in another aspect, its property right to manage its own business, in violation of the Due Process Clause of the Fifth Amendment. The enquiry is, therefore, in this respect a question of fact; in another respect, namely, as to whether the decision of the Board and the Court below construing the Act has not operated to thrust the burden of proof upon the employer to justify a discharge of union men about the time of the formation of a union, is a question of mixed law and fact which likewise, under the authorities above cited, is open to re-examination by this Court.

We proceed, therefore, to an examination of the evidence.

B. The evidence: preliminary:

It is not even alleged in the Complaint herein that the discharges herein were for the *purpose or intent* of interfering with, restraining or coercing the employees in the exercise of their right of self-organization conferred by Section 7 of the Act. It is merely alleged that by the discharges Petitioner "*did* interfere with, restrain and coerce and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed by Section 7 of the National Labor Relations Act", (R. 22). Petitioner objected to the jurisdiction of the Board on this ground but was overruled on the ground Petitioner was "quibbling" (R. 40-42). In other words, the position of the Board must be that no matter what the intent or purpose of the discharges if in fact they were detrimental to the right of self-organization conferred by Section 7 of the Act they may be prohibited. Logically, therefore, the Board's position must be that even if the discharges constituted the "normal exercise of the right of the carrier to select its employees or to discharge them" as stated by this Court in *Texas and New Orleans R. Co.* v. *Brotherhood*, 281 U. S. 548, 571, still, if the *effect of the discharges* is to interfere with the right of self-organization, the employer is forbidden to act. This position seems clearly at variance with this Court's decision in *Texas and New Orleans R. Co.* v. *Brotherhood, supra*, and *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 369, wherein the normal exercise of the right to hire and discharge was upheld. We feel, therefore, that the burden is upon the Board to prove, even though it is not alleged, that the discharges in question were *for the purpose and with the intent of* discouraging the formation of the labor union. Unless there is proof of such an intent it is submitted the Statute would be clearly unconstitutional in penalizing the bare acts themselves for this would amount to a clear diminution of the employer's Constitutional right to hire and discharge at will.

C. The practical problem of how an employer can exercise his right to discharge his employees about the time of the formation of a labor union.

The right to hire and fire has been repeatedly upheld in the Courts. (*Texas and N. O. R. Co.* v. *Brotherhood*, 281 U. S. 548, 571; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 369.) Even the present Act does not—ostensibly at least—take this right away from the employer. The practical problem however is: Suppose an employer some time prior to the formation of the union has made up his mind to "clean house". How is he going to exercise this right? In what way can he protect himself in exercising his unquestioned right to discharge? If in point of fact he cannot discharge union men without the burden of proof being put upon him to show that they were *not discharged* because of their union activities, does not the Act, as construed and applied to his particular case, operate to destroy his right to discharge and thus deprive him of a substantial right in violation of the Fifth Amendment.

This is precisely the situation in the present case.

Dr. Leiserson, Chairman of the Railway Mediation Board and the Board's expert witness in the present case, had a simple solution of this problem, which was that the employer was not supposed to know anything about the formation of the union. (R. 390, 396) As showing the Board's attitude, this witness' construction of the Act is entitled to considerable weight by reason of his position, the fact that he was the Board's expert witness and his long contact with legislation of this character. In answer to direct questions he indicated that when an employer discharged men about the time of the formation of a labor union the burden of proof was on the employer to show that he had not discharged the employees because of their union activities. (R. 390, 391, 393.) Dr. Leiserson testified that in discharging any prominent union man "obviously the purpose is to scare everybody so that there will be no organization". (R. 391.) He admitted that about

the only way the employer could protect himself would be by keeping efficiency records which would disclose his "right" to discharge the man in question at that particular time.[1]

Mr. Leon Arnold and Mr. England, President and Secretary of the Company, testified, as to the discharges on March 4, that the Company had been considering "cleaning house" for a long time prior thereto. The evidence is uncontradicted that for a long period of time prior to the discharges the officers of the Company had noticed a growing inefficiency in the work of the employees dating back to September of 1935. (Arnold, R. 46, 47, 56, 57.) Arnold, the President, had heard complaints from passengers in regard to the lack of cleanliness of the buses and delays in operation. He had talked it over with England, the Secretary, and Wilsey, the foreman of the shop. Wilsey did not know the reason for it. (R. 46, 48, 56, 58.)

Toward the end of November, Mason, a private investigator who had been employed by the Company over a period of years to make periodic investigations of the men, made a secret investigation, riding on the busses. No special instructions were given him as to this investigation or as to any of the previous investigations. (R. 219.) He reported disloyal conduct on the part of Hall a bus driver; also Hall's wife complained that Hall was running around with another woman, riding her on the bus beside him. (R. 292.) Also that drivers West and Magaha had failed to collect the proper fares on occasion. England, the Secretary of the Company, considered West and Magaha either dishonest or careless. (R. 329.) He would have fired West and Mahaga and other drivers in December if the weather had permitted them to break in new men. (R. 340, 345.)

There were complaints against Crissman, a bus driver, to the effect that he was unreasonable and rude to passen-

[1] Yet when Petitioner attempted to put in evidence the efficiency records of the discharged employees the Examiner ruled them out. See p. 9, Assign. 7, pp. 11, 20, 29 this Brief.

gers. So much was this so that a passenger himself went to the Company about it. (R. 399, 406.)

Smith, a bus driver, had had a number of accidents. England claimed that he had a right to take the number of accidents into consideration in firing a man irrespective of whether the man was to blame for them. (R. 333.) Magaha had been involved in twelve accidents in 1935 and one in 1936. (R. 327, 331.)

Mr. Arnold and Mr. England complained to the shop foreman, Wilsey, about the increase in break-downs on the road and about the busses being dirty. (R. 409, 410.) In December they made up their mind to do something about it and started to break in new men to take the places of those they intended later to discharge. (R. 77, 98, 121.) They continued to break in new men during January and February and had six or seven new drivers ready in January. (R. 340, 341.) On account of the increase in accidents and road calls England installed a system of keeping records of them about December the fifteenth. These records the Petitioner attempted to put in evidence but the Examiner refused to allow them on the ground that he did not understand them and did not know whether they had been kept properly or not. (See Spec. of Error 7, p. 11, this Brief.) It was pointed out to the Examiner that it made no difference whether the records were accurate or inaccurate; if as a result of these records the Company came to the conclusion that a state of inefficiency existed and later acted upon it this was admissible to overcome the seeming presumption that the men were discharged in March because of their union activities. (R. 307, 311.) The Examiner, however, continued in his refusal to allow their admission, which seriously injured the Petitioner. He did however permit England to testify of his independent knowledge, without resorting to the records, that the number of road calls increased from January the first to March the fourth, 1936. (R. 307, 312.)

Conditions as above described continued during January and February. In February certain patrons of the Company told Arnold that they had heard that busses would not be running subsequent to Saturday, February the twenty-ninth; that the men were going on strike; also that one driver had stated that he was going to get off the bus at the top of Picket's Hill and let it run wild. (R. 50, 60-63, 69.) About this time one of the drivers told him that a policeman had stopped him on M Street and said that there was a report that the brakes on the Arnold busses were in bad shape. This led to Mr. Storer, the brake Inspector for the Washington Traffic Bureau, making an inspection. (R. 63, 64.) Storer found circumstances which were at least suspicious and so reported. (R. 63, 64, 77-82.)

As already stated, Arnold had a number of conferences with England and Wilsey, the shop foreman, relative to the equipment and operation of the busses and the delays and road calls from time to time during the months from October on. (R. 60.) There was an exceptionally large number of road delays and break-down of busses in the latter part of February. Complaints as to cleanliness were more numerous in the four or five months prior to March. (R. 60, 61, 109, 112.) England offered in evidence records of the Company showing the increase in these break-downs and service calls, but the Examiner refused to admit them on the ground that the Examiner did not understand the various notations on the records and apparently the records were not good enough for the Examiner. (R. 114, 115, 117.)

Some time in February the management discovered that a man named Griffin, a professional labor organizer who had secured employment with the Company under the pretense that he was a workman, had been organizing the men into a union some time from September forward. (R. 47-49, 51.)

As a result of all of these things and the accumulated difficulties from September to February the management determined to "clean house". (R. 366, 367.) About this time

came the rumors that no busses would be running subsequent to February the twenty-ninth, and that one would be allowed to run away down hill. (R. 61.) Arnold called in Wilsey and England and asked Wilsey for a report on his men. The men that Wilsey and England recommended to be dismissed were dismissed, and the new men they had been breaking in put on the jobs in addition to various men obtained in answer to an advertisement placed in the newspaper. (R. 122.)

Both Arnold, the President of the Company, and England denied that the union activities of the men had had anything to do with their discharge and pointed out that the Company still had more union men in its employ than it had discharged. (R. 51, 62, 96, 100.) (Of the eighty employees, fifty-seven were members of the union, and of these only twenty were discharged. The President was not discharged.) The Examiner refused to allow the Petitioner to show that while some union men had been fired other union men were still in the employ of the Company, and that England believed at the time that those continued in the employ of the Company were union men. (R. 353, 355.) This prevented Petitioner from rebutting the "presumption" that because some of the union men were fired about the time of the formation of the union they were fired *because* of the union. It also prevented the Petitioner from showing the efficiency of the union men retained compared with the efficiency of the union men discharged.

D. The right to "clean house".

On the basis of the evidence cited under Part I-C we ask this Court how it can be said that the discharges of the 18 union men under the circumstances stated were so entirely without any other basis than the men's union activities that there must be an irresistible conclusion that they were discharged because they joined the union. The growing difficulties from September and October until February, the lack of efficiency, increase in road calls, signs of disaffec-

tion, rumors of sabotage, rumors of a strike, were all matters which the Company was entitled to take into consideration in leading up to its conclusion to "clean house". The fact that it determined in December to break in new men shows that the discharges were not because of the union for the testimony shows that the officials of the Company knew nothing about the formation of the union until some time in February. Further, the conclusive fact appears that all the union men were not discharged. Nor is there any testimony to the effect that the management singled out or even knew the ring-leaders of the union. As a matter of fact, the President of the union is still in Petitioner's employ. The Examiner prevented the Petitioner comparing the efficiency records of the union men still employed with the records of the union men fired, which in itself seems to Petitioner to be reversible error. But even without this is it so clear to this Court that there was no other reason for the discharge of these men than the formation of the union?

We say that if the evidence in this case is sufficient to raise the inescapable conclusion that the men were fired because of their union activities then the Act, as construed and applied herein, throws upon the employer the burden of proof that in exercising his constitutional right to discharge he must be prepared to prove conclusively that the men discharged were discharged for some reason other than their union activities. This overlooks the fact that an employer has a constitutional right to discharge employees for no reason at all. If the exercise of this right is, by the present Act, so restricted as to cut down the constitutional right so that an employer can discharge only for a *good* reason, it follows that the right has been curtailed in an important aspect, and the legislation is, therefore, unconstitutional.

Conceding for the sake of argument that an employer has no right to discharge employees for the purpose of destroying a labor union, though even this we believe is still open

to argument on the basis of *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 369, and *Adair* v. *United States*, 208 U. S. 161, the exercise of this right as any other constitutional right should be prohibited only upon the clearest showing. In a border line case, and we do not concede that this is one, the tendency of the Courts should be to sustain the constitutional right rather than to extend restrictions upon it or upon its exercise. After a long period of difficulties with inefficient employees, the fact that at or about the time of the formation of a labor union the employees became so inefficient and the reports of their proposed conduct so serious to a transportation line that one third of the union employees were discharged, does not prove their dismissal was due to union activities. Joining a union carried on, in part, by a vice-president of that union in the private office of the President of the Transportation Company, may have been one factor in the case which led the men to believe that they, and not the directors were running the company. Whether the mental attitude created by the men joining the union was the cause of their conduct and statements need not be sought out by the executives of the corporation. Conditions were such, actual and reported, that a transportation company could not exist if they continued. Who is to say that Arnold was not justified, therefore, in taking drastic action when presented with a drastic state of conditions such as the stoppage of busses as well as possible destruction thereof. If the threats were carried out, as reported to Arnold, the damage would have been done, the losses tremendous and with a company heavily in debt, it might have proved disastrous. Arnold was not required to wait until the horse was stolen to lock the stable door.

We submit to this Court that if this Act is to be interpreted to destroy any rough and ready method the employer has for determining which employees he wants and which he does not want the Act is clearly unconstitutional by imposing a bureaucratic supervision of his constitu-

tional right to hire and discharge at will. These questions are of some interest in the present case as it cannot, by the farthest stretch of the imagination, be contended that there were not various reasons for the discharge of the individual employees herein in addition to the reasons leading up to the management's determination to "clean house".

We say the conduct of this case and of all cases of this character will inevitably lead the Board into roving inquisitions into the justice or injustice of the discharge of individual employees, into questions of policy of employers, into whether there were good reasons for the discharge of any particular employee, and thus the freedom of the employer will be destroyed and his business supervised by a Bureau in Washington. It is noted that the Board in its argument in the Court below makes the point that an order to restore the employee to duty with back pay does not establish a permanent condition. If it does not it is entirely futile. The ordinary relationship of employer and employee is substantially a personal service contract. Courts of equity have always disclaimed any power to issue mandatory injunctions compelling the specific enforcement of contracts of personal service.[1] This is substantially what an order to re-instate the employee amounts to. It seems folly too to believe that an order of re-instatement, virtually a command to keep a particular employee employed or go out of business, can ever be beneficial either to the employee or to the company. The employee will assume that the company is making up one of Dr. Leiserson's favorite efficiency records against him with the object of discharging him later on after the company has accumu-

[1]See Mr. Justice Holmes' Opinion in *Marcus Brown Holding Co.* v. *Feldman*, 256 U. S. 170. See also *Boyer* v. *Western Union Tel. Co.*, 124 F. 246; *Union Pacific R. Co.* v. *Ruef*, 120 F. 102; *Coburn* v. *Cedar Valley Land Co.*, 25 F. 791; *Miller* v. *Warner*, 42 App. Div. 208; *Davis* v. *Foreman*, 3 Ch. 654, (Eng.), 1894.

One of the reasons is the inequity which follows from the lack of mutuality. Thus a Court compelling an employer to re-instate the employee would have no way to compel the employee to continue to work for the employer and so a basic inequity would exist.

lated enough good reasons for his discharge to satisfy the Labor Relations Board in Washington. This one fact seems proof enough that the employer's right is being cut down and this too without any corresponding benefit to the employee.

E. The data as to the discharge of each individual employee.

The following information appears as to each individual employee and should be considered as the Petitioner's "defense" for discharging them when it determined to "clean house":

West: Employed two years and eight months as a bus driver; Financial Secretary of Union; discharged without any reason being given; no accidents, but Mason, called "spotter" by the Board, reported he failed to collect fares. The Board, in its Findings of Fact, seemed to indicate that this happened only once. The record, however, showed it happened three times (R. 293, 294). He was discharged partly because of the reports about him from Mason and partly because there were complaints about him (R. 326, 339). There was some trouble also about the Relief Fund and West had said that "there won't be any Relief Fund in a few days". (R. 356, 364.)

We submit that if the management had determined to "clean house", which is the uncontradicted testimony, there was ample reason for deeming West less desirable than one as to whom there was no complaint or any previous difficulty.

Hall: Employed two years and five months; Union man; the investigator Mason heard him complain to passengers in the bus he was driving about the company using a small bus; told the passengers to get together and see Arnold about it so they would not have to stand in the afternoon when the bus carried mail; said the company put small busses where large busses should be used and vice versa;

talked continually on route. This was in December, 1935, before any information about the Union came to the Petitioner (R. 292). On another occasion on the same day Hall continued to complain to the passengers and agitate them with regard to a larger bus; told the passengers that he, Hall, had told the supervisor that he was a dirty rat. Hall's wife reported to England, the Company's Secretary, that Hall was running around with a woman, riding her on the front seat of the bus and not collecting any fare from her. The woman was breaking up her home and Mrs. Hall asked him to discharge him which might break up the affair. England said that he would try to straighten it out without dismissing him but later did dismiss him on the basis of Mason's report and on what his wife had said. Prior to dismissing him he had spoken to Hall about the woman on several occasions but his warnings did no good. His wife called England several times about it. He did not dismiss him in January but dismissed him with the other men in March as in March he had the new men broken in (R. 336, 337).

In the Board's brief below Hall's irregularities are referred to as not of a serious nature, occurring several months prior to the discharge. In addition, the Board complained that the particulars of the "spotter's reports" were not specified. This confirms Petitioner's contentions that while ostensibly the Board is engaged in the task of ascertaining whether the employees were discharged *because of* the Union, in reality the Board has slipped into the inevitable error of most Government agencies in a position of authority and is exercising a general power to review the reasons for the particular discharge, thrusting the burden of justifying the discharge on the respondent. The Board's finding as to Hall shows that the Board is exercising a general power of supervision over the Petitioner's right to discharge. (R. 533-534)

We submit there was ample reason to discharge Hall as

between Hall and a person as to whom there was no difficulty.

Magaha: Bus operator for two years; no reason given him for discharge. Magaha's records showed accidents February [illegible], 1936, December 12, 1935, November 18, 1935, November [illegible], 1935, September 30, 1935, September 21, 1935, August 21, 1935, August 8, 1935, July 28, 1935, December 3, 1935, January 26, 1935, and January 28, 1935 (R. 329, 331). Some of these accidents Magaha *admitted he was to blame for.* Investigator Mason's report also showed that on December 8, 1935, he failed to collect proper fares (R. 327). England, secretary of the company, testified that he took the reports and the accidents into consideration when he discharged Magaha (R. 331). In addition, England claimed that he had a right to discharge a man for accidents even though the accidents were not the man's own fault; that the company did not keep drivers with them who had accidents (R. 333-334), the length of time they kept the men being dependent upon the kind of accident (R. 334).

The right of the Petitioner to discharge Magaha was criticized below by the Board on the ground that Petitioner's evidence lacks specification as to the complaints; that the irregularities were not of a serious nature and no particulars were specified. Magaha's accidents were referred to with the remark that "he had had several" in the two years preceding his discharge but none were serious.

We submit that thirteen accidents in two years, guilty or not guilty, like the three generations of idiots in Mr. Justice Holmes' opinion in one of the Sterilization Cases,[1] "is enough".

Crissman: Bus driver; employed six and a half years; Union member; no reason given him at time of discharge. A passenger, an employee of the Bureau of Internal Revenue named Joy, complained about Crissman's discourtesy and general lack of good sense (R. 325, 399, 401). On one occasion Crissman refused to take a transfer from him and

[1] *Buck* v. *Bell*, 274 U. S. 200.

was very loud and discourteous. On another occasion he was again discourteous to him about a transfer and made him feel like a fool (R. 405). On another occasion there was a rain, a lady got on the bus, put her fare in the box and the man with her was about to get in with a small dog on a leash. Crissman wouldn't let the dog in and made both the man and the woman get off the bus in the rain though there were vacant seats in the bus at the time. On another occasion he said Crissman made short, snappish and rough remarks to the passengers. These various incidents regarding Crissman were sufficient and numerous enough to arouse Joy to the point of complaining officially to the company (R. 404, 406). Crissman called up and said he was sick and could not work the morning after February 29th, due to his activities the night before (R. 350). This produced the following revealing comment from the examiner, Mr. Carmody:

> "Mr. Carmody: These bus drivers live in gold fish bowls, don't they, in most companies, and not much of their private life that isn't brought out by your checkers and investigators, and spotters is there?" (R. 350)

The Board in its brief below pooh-poohs the complaints against Crissman, comments on the complaints being eight months old, states they were of minor importance and complains that there was no specification of the particulars.

We submit that Petitioner had ample reason for discharging Crissman in comparison with a driver against whom there were no complaints. It must be remembered as to the above that Petitioner was prevented from comparing the data against the above drivers and against the other employees discharged, with the records of the various employees retained. The Examiner refused to allow this (R. 307, 311).

The remaining employees discharged were employees in the garage. To our way of thinking the Petitioner had con-

siderable reason for discharging each one of them. Petitioner is not compelled to prove beyond a reasonable doubt that it was properly exercising its constitutional right to discharge the men in question. Thus as to Beall, he had had no heavy duty experience, being a slow worker and hard to keep at work. In addition he had some outside difficulty in the way which prevented him staying on the work. He would leave the job in the afternoon after working in the morning and generally speaking was a hard man to keep on the job. On one occasion he had put in a clutch and they later had to take it out the same day, which cost the company money (R. 449).

As to Birch he was doing pretty well but he paid very little attention to anything likely to help him. Wilsey, the foreman, had to keep after him all the time and watch him very closely; he would destroy almost as much as he would make. He talked with him a number of times and tried to help but he did not seem to improve (R. 449).

It is true that neither Beall nor Birch had received a complaint concerning their work or been reprimanded but of course at this time there was no general order of the Board requiring employers to observe this practice. In its brief below the Board refers to the company's statements about Beall and Birch as being "vague and unsubstantiated allegations of inefficiency". This gives us an insight into the Board's viewpoint. Upon a charge such as the present the Board evidently will not take at its face value a company's observation, from the lips of its shop foreman that certain mechanics were not as good as they could be. Such reports must be "substantiated". Substantiated by what, we ask? We contend that even if the reports were wrong the company is absolved from blame in discharging the man if in fact it discharged him on the basis of the reports.

Garrison, Moore and Dove were bus washers. England, the Petitioner's assistant general manager, testified that passengers had complained of soiled clothes in the buses during the winter; that the company had to pay for clean-

ing clothes in a number of cases, about a dozen times in 1935; that the fault must have been that of the night bus washers and accordingly Moore and Garrison were discharged (R. 302-305). Dove was discharged for the same reason (R. 348). England had complained to Wilsey, the shop foreman, about the dirty busses and Arnold had been "riding him about it". Wilsey fired the men for this reason, because of their inefficiency in keeping the buses clean (R. 348, 448).

Smith: Garage worker. He gassed and oiled the busses. Wilsey blamed Smith for letting a bus run out of gas on a couple of occasions. After the morning run the busses would come in the garage and they would find the gas caps off and oil over the fenders and down the sides of the hood and oil filter caps missing. They had to buy these things by the dozen. Smith was to blame for it (R. 448).

As to McCauley, a garage employee, he originally had been a laborer engaged in putting chains on cars. The night foreman reported to Wilsey, the shop superintendent, that he was a very poor mechanic. Wilsey replied "Well, I'll get rid of him and see if I can pick you up a new man". This took place around the 11th of February. (R. 447)

As there is no testimony the management knew anything about the Union until the end of February it would seem that the Petitioner's defense of its right to discharge McCauley should be allowed.

Atwell: Garage employee. His work had only been satisfactory in spots. There were complaints about pilot bearings and clutch bearings burning out; the greasing was bad. He had broken up a grease gun and fittings were lying all around the place. This seemed to be a constant condition. Part of it could be attributed to Atwell, who was responsible for the greasing at night (R. 441, 442). Wilsey had a grease record of the man that showed the jobs that were bad. They kept him on a long while but finally fired him (R. 441-442).

Miller: A garage employee. The foreman reported to the superintendent a couple of times that he was not much

of a mechanic and that he, the foreman, wanted a better man (R. 451).

He was not a first rate mechanic. On a certain job he left parts around and acted as no mechanic ordinarily does (R. 507, 508). Record slips kept by the shop superintendent showed Miller's lack of ability (R. 508-511). He was supposed to mark down the time he worked on each bus on these slips, but did not do so (R. 511). They made up their mind in the middle of January to discharge him (R. 511). Miller, when he came to work would not pick his work up and the foreman would have to almost take his hands and lay them on the work (R. 512).

On one occasion a brake job turned out bad and he blamed this on Miller (R. 515, 517).

Theodore W. Frederick: Frederick was the acting day foreman. There had been a number of breakdowns as already shown and these had increased over a period of months and there was also some foreign substance showing up in the carburetors which prevented their working properly (R. 409-511). The men were continually in huddles neglecting their work. In part the shop superintendent Wilsey blamed this condition on Frederick, the day foreman, and this was one of the things that led up to his desire to "clean house" (R. 423, 424, 429, 430).

Philmore W. Frederick: He was a mechanic's helper in the garage employed on the day shift. The shop superintendent stated that the last two or three months he was "becoming kind of dominant and would react against any orders more or less" (R. 442). To be a good mechanic he should have had tools and would not buy them, not even a pair of pliers or a five cent tool. When he asked him about this Frederick replied "You don't pay enough money to buy tools" and "Why don't you pay enough wages" (R. 442, 443). He didn't think this was the proper way for Frederick to talk and made the same remark to Frederick's brother, the acting day foreman, saying as to Philmore Frederick "The boy is feeling his oats". He was insolent

on another occasion. There was bickering between them but he let it go. Frederick seemed to have reached his capacity as a mechanic the first year he was there. Wilsey took him off the job of washing cars and put him on the day crew though he refused the first time to work on the day crew which was a better job. He did not seem to want to become a more skilled laborer and reacted against Wilsey's effort to make him one. He showed no mechanical improvement thereafter. Seven weeks prior to his discharge they put him on a spring job in the shop but he got so tangled and tied up on the job that the superintendent was disgusted and said to him "Boy, you'll never be anything but just a grease ball" (R. 443).

McDonald: A mechanic in the garage. Engaged in body work; the shop superintendent kept a record of each man. On McDonald's record appeared the words "Stall, lazy and not neat" which referred to his workmanship. The inside of the bus should be kept neatly, the moldings and the weldings smooth. McDonald was a sort of an apprentice to Wilsey, the shop superintendent, who was compelled to explain things to him constantly. He had the habit of making a mess all about him which had to be cleaned up (R. 445, 446).

Harmon: Working foreman on the night shift. Harmon, like Theodore Frederick, was held by the management to be responsible for the unsatisfactory conditions in the shop and was discharged on this account. He had been discharged twice before (R. 413, 419).

We contend that on the basis of the information furnished the management by the shop superintendent, Mr. Wilsey, and coming to the management from other sources, coupled with general conditions which had gotten steadily worse since October, the Petitioner was amply justified in discharging the various employees mentioned. It may be that the record may show differences of opinion between the management and the various employees or between the management and the discharged day and night foremen as

to whether the employees discharged were efficient or inefficient. It is submitted, however, that the question before the Board was, not whether in actual fact the particular employees discharged were good workers or bad workers but whether the Petitioner, through its assistant general manager England or the shop superintendent Wilsey in fact discharged the employees because of their opinion that they were inefficient. It might be that some of the men discharged were efficient. Wilsey and England may have thought otherwise. Certainly the record of each individual as above shown at least supports the view that compared with other employees the particular persons discharged were undesirable looked at from their work in the past. If the management determined to "clean house" it was permissible for it to discharge its least efficient employees or even, if it saw fit, to take a chance on the new employees who answered the advertisement. Going back to the Petitioner's action in so discharging them and attempting to read into the discharge of 20 Union men an effort to destroy the Union when the Petitioner retained in its employ more Union men than it discharged, including the Union's President, is to throw the burden of proof upon Petitioner to prove a negative fact and this we submit amounts to a deprivation of Petitioner's constitutional right to discharge at will. It is significant that not one word appears in the record to the effect that in engaging the new men who answered the advertisement any question was asked them as to whether they were Union or non-Union men or intended to join the Union once they were employed. If there had been any desire to cripple the Union in firing the old men it is reasonable to suppose that there would have been a strong intimation to this effect in engaging the new. The evidence in this case, no matter what view this Court takes of the conflicting testimony with regard to Mr. Arnold's and Mr. England's statements about the Union, in the last analysis is limited to proof that the Petitioner discharged a certain number of Union employees, without singling out

the ringleaders, at about the time a Union was being formed. The Petitioner showed good reason for effecting a wholesale discharge at around this time. If upon the evidence in this case Petitioner is to be convicted of having attempted to destroy the Union by his action we come back to the question already asked in this br[illegible]: In what way can an employer who has determined to discharge some of his employees at about the time a Union is being formed, protect himself? This leads to the conclusion that the drastic penalty of reinstatement with back pay, which is practically a mandatory injunction and will result in the firing of all the new employees, should only be enforced against an employer upon the clearest possible evidence. We submit that no such evidence appears in this case.

F. The alleged efforts of the management to prevent the formation of the union.

Nothing illustrates the lack of evidence to show the management attempted to prevent the formation of the Union more than the character of surmises upon which the Board found the existence of active methods of oppression by the management. The most that the Board could say below is that the President of the Petitioner Company "queried" six of the bus drivers as to their membership in the Union and then related certain unpleasant experiences he had had with the labor Union. (R. 542) Certainly this was a mild example of the right of Free Speech and we believe was fully within the President's constitutional rights. If, as Dr. Leiserson suggests, the formation of a Union is such a tenuous and fragile process that the slightest word from the management will destroy it, we might as well commit ourselves to its ultimate destruction, as life itself does not conserve sensitive plants of this character. But we disagree with Dr. Leiserson and do not feel that there is anything so sacred about the formation of a labor Union that the constitutional guarantee of Free Speech is

repealed by the present statute.[1] We do admit, however, that as construed and applied herein the President of any company who says anything whatever during the formation of a labor Union is likely to be unable to overcome the presumption that he made such a statement to prevent the Union being formed.

Next, to eke out the proof reference was made below to the advertisement for help wanted. (R. 531, 532, 541) There was nothing mysterious or concealed about this advertisement, and we have no apologies to make for it except to say that, as counsel for Petitioner, if we had been consulted about it beforehand we would have advised the Petitioner that there was very serious danger that this advertisement, like the President's very temperate and decent remarks, might also add to the presumption that it was part of a general plan to destroy the Union.

Next, the Board in its Findings (R. 531, 532, 541) points to the circular, described as "a personal message from

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[1] It is interesting to note Dr. Leiserson's views of an employer's right with respect to a labor union. He stated on cross-examination:

> "When you say 'rights with respect to the labor union' he has no business with the labor union, and the labor union is a matter of the employees, and he has no more rights with the labor union than he has, for example, with an association of people who sell him things." (R. 390.)

He also stated in response to counsel's questions as to how tenderly the employer must tread as to recognizing the union:

> "First, let us begin with—here you have got an organization, say, of 59 people, and *of course if the employer were really following the law*, he would not know how many members they had, and which were members and which were not, until they told him. He would have no source of information. * * *
>
> "Q: Except accidentally? A: Except as they told him, *because he was supposed to keep his nose out of it.*" (R. 396.)

We submit that shows the atmosphere of bureaucratic bumptiousness in which the present case was heard. As against Dr. Leiserson there is the clear statement of the Chairman of the Committee at the Senate Hearings to the effect that "there is no law that can prevent you from discussing the matter amicably and peaceably with the workers, * * * nor is there in this Bill anything to prevent an employer discussing with his employees the merits *or demerits* of the various kinds of organizations". Also at the same Hearing Senator Walsh said that with reference to coercion or interference the Bill originally included the word "influence", but that it was stricken out "because we felt that an employer should not be prevented from exercising his influence for or against any particular organization that he thought detrimental to the welfare of his workingmen. Of course, they would be left free to reject his *advice and views* and were not to be interfered with if they did not choose to accept it." (Senate Hearing, Part 3, pp. 557, 558, Italics ours.)

Leon Arnold the President". Even if this message had been put out with the direct object of convincing the men that it was a bad thing to form the Union we say that the President had a perfect right under the Constitution to do this. Again we say that the Act herein does not repeal the right of Free Speech. The message was so far from coercion that only a mind fixated upon the notion that all employers are irretrievably bent upon grinding down their employees could find anything objectionable in it. We ask this Court in all seriousness to read this message, which appears in a footnote below,[1] and arrive at its own conclusion as to whether any Congress in its senses intended any such message to constitute a violation of the Act.

But aside from this the explanation of how the message came to be sent out March 2, 1936, is so simple that the effort of the Board to spell out some dark conspiracy in its appearance at that time indicates either the absurd fixation already referred to or the entire absence of any substantial evidence such that any mud at all is good mud to throw at the employer. The fact is, and we challenge this Court to examine the Record in this respect, the message resulted from a sort of "pep" service which the Company subscribed to a year in advance. The so-called "pep" talks were received in a batch. On a page in the beginning of the book containing on separate sheets the messages in question there are a series of numbers, not consecutive, but which indicate the particular messages to be sent out, de-

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[1] Footnote.—"A Personal Message From Leon Arnold, Washington, Va. & Md. Coach Co., Arnold Operated.

Sometimes groups of individuals in a business organize themselves into cliques.

Webster's definition of a clique is, 'a narrow circle of persons associated by common interests; a small and exclusive set, or coterie; generally used in a bad sense.'

The reason that the word clique is 'generally used in a bad sense' is that the small and exclusive set composing it usually thinks more of promoting the selfish interests of the clique than the collective interests of the organization.

The members are more concerned in serving their own ends than in serving the customers of the business who provide them with employment and pay their wages.

One sure way to acquire a poor standing, both in position and pay, in a business organization is to acquire a good standing in a clique." (R. 532)

pending upon the nature of the business. A slip is sent the Company suggesting which particular messages to send out in rotation. This particular message was sent out in accordance with the Company's instructions, exactly as it turned up in rotation. The Company did not pick out any particular number each week, and the whole supply was purchased at once. (R. 55.) The message of March the first was a routine message which happened to come along at that time. (R. 290, 291.) This is pilloried by the Board as a "coincidence" (R. 532, 541.)

Next is the appearance of Joseph Arnold, the President's son, at the organization meeting (R. 530, 531, 540), wearing a driver's cap. The Board's idea apparently is that he wore the driver's cap to conceal his identity though he worked every day in the week with the men as a fellow employee and was well known to them. Arnold's explanation was that he wore the driver's cap because he had mislaid his hat. (R. 374-384.) Anticipating the objection that the employees knew young Arnold, cap or no cap, (he did not wear a mask) the Board argued (R. 540) that Clark, the organizer and a representative of the National Organization, did not know young Arnold even though the men did. This reduces Arnold's attempted deception to the infantile basis of going to the meeting in a driver's cap knowing he could not escape recognition by all his other fellow employees, but in the hope that he could deceive Clark alone. (R. 182-184, 189, 190, 373, 384.) No such theory is possible. The incident however illustrates the inclination of the Board to take anything into consideration good, bad or indifferent as evidence against the Petitioner.

We now come to Harmon's testimony that Wilsey said that Arnold would put his busses on a lot and burn them before he would recognize the Union (R. 139, 140); that Arnold told Harmon while sitting in his car the night of the organization meeting that he would not recognize the Union; that Frederick had testified that Wilsey said he was not being discharged for joining the Union but because of the "under-handed way" he had gone about it (R. 190);

that England made a similar statement to him at the time of his discharge (R. 141); that Atwell and Miller testified that upon being discharged by England the latter said the Union was at the bottom of the matter (R. 270, 487); Bealle's testimony that when Wilsey discharged him Wilsey said the Union was the cause (R. 233); Frederick's testimony that Wilsey discharged him because he had a Union application blank. (R. 241.)

The Board's comment below on this phase is that England and Wilsey met this damaging testimony by unconvincing denials. "Unconvincing" is a mere epithet. England was a witness of the Board which presumably thought he would tell the truth when it called him to testify. He is accused of "testifying generally", that he did not tell any of the discharged employees that their discharge was founded on Union activities. (R. 301.) He added that when the discharged men asked questions "he did not answer them" (R. 301), presumably following Dr. Leiserson's probable advice. Wilsey's denial that the Union activities of the employees had anything to do with their discharge is referred to sarcastically, like the "personal message", as a "coincidence". (R. 414.)

This Court will realize that in the situation of these discharges, it is an easy thing for a number of workmen to outswear one employer. It is a significant feature of the testimony in the present case that not one single alleged statement as to discharge for Union activities was heard by more than one employee. It is reasonable to suppose that if there had been a serious effort to prevent the formation of this Union some substantial effort, some attempt along the line of a direct threat would have been made. There would be the usual testimony that the management was engaged in "boring from within". There is no such showing in the present case. The Board's own witnesses Arnold and England testified that they made no effort whatever to discourage the men and their denial ought to stand on a higher footing than the obviously interested statements of the men relative to their discharge for Union activities, which statements are unconvincing, if for no other reason,

than the fact that assuming them to be true they were made when it was all too late, and the Union was already formed. It is too much to argue that after a Union is formed the Petitioner would discharge twenty out of fifty-seven Union men on the theory that their discharge would be a lesson to the remainder. This argument might have some sense if it were coupled with further testimony that an effort was then made to get the remainder of the fifty-seven to resign or otherwise to destroy the Union. But there is no such testimony in the present case. The management's alleged efforts to destroy the Union ceased upon the discharge of the men; their efforts were meaningless or they were not efforts at all, or did not occur at all. We believe the latter.

As against this elaborate effort to spell out a conspiracy to destroy the Union already formed, an effort trenching on the one hand on the guarantee of Free Speech, on the other hand upon plain ordinary common sense, are the substantial reasons already developed in the present Brief for the determination to "clean house", and the reasons supporting the discharge of each particular employee. We say again that in an exceedingly complex matter of this sort wherein the order of the Board is so drastic as to amount to a question of economic life or death for the Company this Court ought to be convinced only by the clearest possible evidence. We ask this Court to consider the ease with which a change like that herein may be made, the ease with which a specious proof may be adduced, supported by the favorite argument of "coincidence", and the difficulty of the disproof by the Company of these easy charges. We ask this Court again to consider the matter in the light of the argument already made that for all practical purposes the Act, as construed and applied herein, has operated to thrust the burden of proving a negative fact, the absence of any effort to destroy the Union, upon the Petitioner. Such a viewpoint will reveal the "clear error" referred to by the present Chief Justice in *Texas and N. O. R. Co.* v. *Brotherhood*, 281 U. S. 548.

Part II.

Unconstitutionality.

A. The act herein is unconstitutional in its entirety.

As already stated, Petitioner at the outset of the proceedings before the Board appeared specially and filed an objection to the jurisdiction of the Board asserting the unconstitutionality of the Act on the same grounds as in the companion cases herein, namely:

1. On the ground that the Act was a delegation of legislative power to the Board in violation of Section 1, Article 1 of the Constitution;
2. That the Act was a delegation of judicial power in violation of Section 1 and Section 2, Paragraph 1, Article 3 of the Constitution on the ground that Section 7 of the Act as construed and applied herein was in contravention of the Fifth Amendment, the Board construing the said Section 7 to grant an absolute and unqualified right of self-organization to employes unrestrained by the necessity of the exercise of such right subject to the rights of Petitioner and the public;
3. On the ground that Section 8, Paragraphs 1 and 3 of the Act in themselves and as construed and applied deprived Petitioner of its liberty and property without Due Process in violation of the Fifth Amendment;
4. On the ground that Section 10 as construed and applied denied Petitioner the right of trial by jury and the right to have facts so tried examined in a Court of the United States according to the rules of the common law in violation of the Seventh Amendment, the said Section 10 likewise conferring on the Board judicial power in violation of Sections 1 and 2, Article 3 of the Constitution;
5. On the ground that the Board in construing and applying the Act exercised powers contrary to the reservations of the Tenth Amendment of the Constitution, (R. 26-28).

Petitioner's objection to the jurisdiction of the Board on the above Constitutional grounds being overruled, Peti-

tioner, without waiving its objection to the Board's jurisdiction, filed an Answer to the Board's Complaint, (R. 28).

The above Constitutional objections are likewise reiterated in the Specification of Errors in the present Brief. (P. 10.)

Inasmuch as the constitutionality of the present Act has been assailed from every possible angle in the case immediately preceding the present and the cases following it, counsel herein out of deference to the time of the Court will not repeat the arguments contained in the able Briefs in these companion cases, but respectfully ask leave to make them a part of the present Brief by reference.

As the recently unreported decision of the Circuit Court of Appeals for the Ninth Circuit in *National Labor Relations Board* v. *Mackay Radio and Telegraph Co.*, (January 11, 1937), may not be made part of the various Briefs herein we respectfully refer this Court to this decision and specifically rely upon its judgment holding the Act unconstitutional as in violation of the Fifth and Seventh Amendments. This case, like the present, admittedly involved interstate commerce.

As the present case seems to be the only admittedly interstate case counsel for Petitioner will devote the remainder of the present Brief to questions arising in the present case alone.

B. Petitioner has the necessary standing to argue inseparability:

Petitioner herein is aware of this Court's decisions in *New York ex rel Hatch* v. *Reardon*, 204 U. S. 152 and other cases[1] to the effect that a party cannot invoke the decision of this Court in respect to a provision of a Statute which is not invalid as applied to him. Petitioner, however, is not in this situation. Petitioner's argument under this

[1] Such as, *Supervisors of Albany County* v. *Stanley*, 105 U. S. 305; *Yazoo & Mississippi V. Railroad Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217; *Austin* v. *Aldermen of Boston*, 7 Wall. 694; *Lee* v. *New Jersey*, 207 U. S. 67; *Dillingham* v. *McLaughlin*, 264 U. S. 370; *Darnell* v. *Indiana*, 226 U. S. 390; *Hicklin* v. *Coney*, 290 U. S. 169.

point is that the Statute shows on its face a comprehensive scheme to regulate intra-state as well as inter-state activities, with an object in view which could not be attained through the regulation of interstate relationships alone. Hence it appears affirmatively that Congress would never have passed the Statute to regulate the few remaining lines of inter-state activity if it could not constitutionally regulate labor relations in intra-state industry as well. In this aspect the question is one of statutory construction, *i.e.*, having already in the Railway Labor Act of 1934 regulated the railroads and allied transportation systems with respect to labor, can it be fairly argued that, the "comprehensive scheme" and the "object" of the Act being outlawed, Congress intended in the present Act to regulate the few remaining inter-state activities such as bus companies and communications systems. In this respect the present case seems somewhat similar to the *Trade-Mark Cases*, 100 U. S. 82.

Petitioner feels that when this Court has before it a number of cases involving the intra-state application of the Act, with the Records in support thereof, it is entirely proper for the present Petitioner to argue the lack of intention on the part of Congress to apply the Act to Petitioner if the Act is held unconstitutional as beyond the Commerce Clause in an intra-state case. If the present Petitioner cannot raise this point under the present circumstances it seems clear that the question never could be raised by one in Petitioner's position and so the Statute might be misconstrued or applied unconstitutionally, with no recourse.[1]

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[1] Also this Court has held that if the "heart" or bone and sinew of an Act is unconstitutional a litigant may avail himself of the fact even though the particular provisions are not invoked against him, (see the first Employers Liability Cases, 207 U. S. 463, and *Carter* v. *Carter Coal Co.*, 298 U. S. 238).

An additional reason is that the jurisdiction of the Court below and of this Court is dependent solely upon the constitutionality of the Act. (See Sec. 10-e of the Act) Not only the litigants in question but the Court itself must consider the Act in its constitutional aspect in order to arrive at a finding that jurisdiction exists.

C. The cases on inseparability do not prevent the judicial inquiry herein asked:

The Separability Clause in Section 15 of the present Act is not conclusive upon the Courts, but is merely an aid in determining the legislative intent and not a binding command:

Carter v. *Carter Coal Co.*, 298 U. S. 238;
Dorchy v. *Kansas*, 264 U. S. 286;
Railway Retirement Board v. *Alton R. Co.*, 295 U. S. 330, 362.

The effect of a separability clause is simply to reverse the presumption in favor of inseparability and create the opposite one of separability, *Carter* v. *Carter Coal Co.*, *supra.*

The result is that the presumption must be overcome by considerations which establish "the clear probability that the invalid part being eliminated the Legislature would not have been satisfied with what remains",

Carter v. *Carter Coal Co.*, *supra*, citing
Williams v. *Standard Oil Co.*, 278 U. S. 235, 241;
Utah Power and L. Co. v. *Pfost*, 286 U. S. 165, 184-185.

As this Court said in *Carter* v. *Carter Coal Company*:

> "Whether the provisions of a statute are so interwoven that one being held invalid the others must fall, presents a question of statutory construction and of legislative intent, to the determination of which the statutory provision becomes an aid. 'But it is an aid merely; not an inexorable command.' *Dorchy* v. *Kansas*, 264 U. S. 286, 290. The presumption in favor of separability does not authorize the court to give the statute 'an effect altogether different from that sought by the measure viewed as a whole.' *Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 362.
>
> "The statutory aid to construction in no way alters the rule that in order to hold one part of a statute un-

> constitutional and uphold another part as separable, they must not be mutually dependent upon one another. Perhaps a fair approach to a solution of the problem is to suppose that while the bill was pending in Congress a motion to strike out the labor provisions had prevailed, and to inquire whether, in that event, the statutes should be so construed as to justify the conclusion that Congress, notwithstanding, probably would not have passed the price-fixing provisions of the code." (*Carter* v. *Carter Coal Co., supra.*)

Petitioner accepts the burden of showing the clear probability that, the comprehensive scheme aside, Congress would never have passed the present Statue to regulate in a bona fide manner bus companies and allied lines of activity alone, and that such an application would, in the words of this Court in *Retirement Board* v. *Alton R. Co., supra,* give the Statute "an effect altogether different from that sought by the measure viewed as a whole".

D. The way the court below passed upon the question of separability:

The Court below in its Opinion (R. 597) after stating that Petitioner had attacked the Act upon the ground of inseparability and referring to the *Carter Coal Case* stated:

> "There would be some basis for the application of this line of reasoning in the pending case if the Board's construction of the act were tenable, and it were reasonable to interpret the act as applying to intrastate as well as interstate activities. But as we have endeavored to show in an opinion filed this day in *Foster Bros. Mfg. Co.* v. *National Labor Relations Board,* the power conferred upon the Board to prevent unfair labor practices, as set out in Section 10 (a) of the act, is restricted to unfair labor practices affecting commerce, and commerce is defined to mean trade, traffic, commerce or transportation among the several states or with foreign countries, Congress therefore did not intend to regulate intrastate as well as interstate commerce, and there is no ground for the argument that

an important and inseparable part of the act having been condemned, the whole act must fall." (Record, page 597, 598).

The Opinion in *Foster Brothers Manufacturing Co.* v. *National Labor Relations Board* will be found reported in 85 F. (2d) 984. That case involved a bed manufacturing company in Baltimore, Maryland. The Board held as in the present case that the company's discharge and refusal to re-instate ten employees was an unfair labor practice. The Court held that the power of the Board to prevent unfair labor practices under Section 10 (a) was restricted to an unfair labor practice "affecting commerce". Under the *Schechter* and *Carter* cases it held that the activities of an intra-state manufacturing concern like the Baltimore company did not "affect commerce" and hence they were beyond the power of Congress to regulate. It stated that it might be immaterial whether the question to be decided was to be considered one of statutory regulation or of constitutionality, but since it could not be supposed that Congress intended to pass an unconstitutional law the Court preferred to rest its decision on the ground that Congress never intended the Act to apply to the circumstances of the *Foster Brothers* case.

As will be shown later under the present point it seems impossible to believe that Congress did not intend the Act to apply to the circumstances of the *Foster Brothers* case, and so the Court below was in error in resting its decision upon a question of statutory construction rather than unconstitutionality. We contend that if Petitioner argued below the question of inseparability, and if the Court below decided it against Petitioner on the basis of its decision in the *Foster Brothers* case, which decision avoided the constitutional question by invoking a doctrine of statutory construction, Petitioner's only remedy in the present case is to show that the Court below was in error on the question of statutory construction. In any case, aside from the

grounds of the decision below the validity of Petitioner's present argument on the question of inseparability will turn upon the ground upon which this Court rests its decision in the intra-state cases to be argued with the present case. No matter what the basis of the decision of the Court below, if this Court should hold in the intra-state cases herein that the Act is unconstitutional, then the present Petitioner would seem to have the right to make the present argument as to inseparability. We proceed then to this argument.

E. The act shows a comprehensive scheme to regulate employer-employee relationships in local industry as well as in inter-state commerce:

The Act shows on its face that it was intended to regulate local industry as well as companies engaged in inter-state commerce:

(a) The title of the Act is admissible to show the Congressional intent (*Hill* v. *Wallace*, 259 U. S. 44, 66-67). The Act is entitled "An Act to Diminish the Causes of Labor Disputes Burdening or Obstructing Inter-State and Foreign Commerce, To Create a National Relations Board and for Other Purposes." The Act is not limited to the prevention of disputes arising in inter-state commerce but covers any labor dispute in any industry which might "burden" or "obstruct" commerce, *however indirectly.*

(b) Section 8 prohibits employers from engaging in certain "unfair labor practices." The Act does not limit the prohibition to employers while engaged in inter-state commerce but covers all activities. This is further shown by the definition of employers in Section 2 (2) as "any person acting in the interest of an employer, directly or indirectly." The ensuing specific exceptions are a further indication of the all-inclusive meaning of employers.

(c) Employee is defined by Section 2 (3) to include all employees with the exception of agricultural laborers, domestic servants, etc. What would be the neces-

sity for the exclusion of domestic servants unless the Act was intended to apply to all others engaged in local or intra-state labor?

(d) Further proof of the above is found in Section 10 (a) empowering the Board "to prevent any person from engaging in any unfair labor practice (listed in Section 8) *affecting* commerce." (Italics ours).

(e) "Affecting commerce" is not limited to "occurring in inter-state or foreign commerce", which is defined in Section 2 (6). "Affecting commerce" is defined in Section 2 (7) to mean:

> "In commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

This means the Board can prevent "unfair labor practices" in any local industry if such practice *however indirectly* tends to lead to a labor dispute *however indirectly* burdening or obstructing commerce.

(f) Section 1 of the Act "Findings and Policy" may be resorted to to show the legislative intent. *Beard* v. *Rowan*, 9 Pet. 301; *United States* v. *Butler*, 297 U. S. 1. Note in the "Findings and Policy" that the denial of the right to organize and the refusal to accept the procedure of collective bargaining leads to strikes, that strikes obstruct commerce by "materially affecting, restraining or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce"; that strikes cause diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce. This Section does not restrict "employers" to employers engaged in inter-state commerce. It does not restrict "strikes" to strikes occurring in inter-state commerce, and in particular, it does not restrict the effect of strikes to burdening and obstructing inter-state commerce. On the contrary, strikes are apparently held to burden and obstruct anything and everything. They cause diminution of employment not in inter-state commerce but anywhere. The whole Section refers not to disputes in inter-state commerce, but to disputes in

local industries "affecting" the flow of goods and *indirectly* affecting the flow of goods into the channels of commerce.

The further finding that the inequality of bargaining power burdens and affects the flow of commerce and tends to aggravate business depressions by depressing wage rates, "the purchasing power of wage earners *in industry* and by preventing the stabilization of competitive wage rates and working conditions within and between *industries*" shows that Congress was not referring to the bargaining power of employees in inter-state commerce only. Applied to the present case what possible effect would the inequality of bargaining power among the employees of bus companies and communications systems, even including all the stock yards employees and those working on grain elevators, have upon economic conditions generally in this country? Excluding railroads what effect has the purchasing power of employees in the other lines of inter-state commerce upon a business depression? Further, Congress refers to wage rates "*in industry*," not inter-state commerce, as having an effect upon business depressions.

(g) The administrative interpretation of the Act is a guide to its construction (*Kern River Co.* v. *U. S.*, 257 U. S. 147, 153-4; *Mintz* v. *Baldwin*, 289 U. S. 346, 351). The administrative interpretation has been "nation-wide and fancy-free."[1]

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[1] The following table compiled from the First Annual Report of the National Labor Relations Board for the fiscal year ended June 30, 1936, shows how few clear inter-state cases the Board has taken under consideration contrasted with the large number of cases involving local manufacturing or production

Intra-State Cases (Local Manufacturing or Production)

Gate City Cotton Mills
Wayne Knitting Mills
Fruehauf Trailer Co. (2 cases)
Friedman-Harry Marks Clothing Co., Inc.
Rollway Bearing Co., Inc.
Brown Shoe Co.
Radiant Mills Co., Inc.
Wheeling Steel Co. (representation)
El Paso Electric Co. (2 cases)
Vegetable Oil Products Co., Inc.
Duplex Printing Press Co. (representation)
Duplex Printing Press Co. (complaint)
Atlas Bag & Burlap Co., Inc.
Saxon Mills
Mosinee Paper Mills Co.
Gibbs Underwear Co.
Englander Spring Bed Co.
Ohio Custom Garment Co.
Hardwick Stove Co.
Jones & Laughlin Steel Corporation
Typographic Service Co., Inc.
United Parlor Furniture Co.
Standard Lime & Stone Co.
S. L. Allen & Co., Inc.
Alabama Mills, Inc.
Wheeling Steel Corporation
F. C. Castelli Co., Inc.
Columbia Radiator Co.
International Nickel Co., Inc.
Alaska Juneau Gold Mining Co.
The Warfield Co.

Interstate Cases or Doubtful

Pennsylvania Greyhound Lines, Inc.—Greyhound Management Co.
Delaware-New Jersey Ferry Co.
United Fruit Co.
United Aircraft Mfg. Co.
Western Union Telegraph Co.
New England Transportation Co.
Mackay Radio and Telegraph Co.
Consumers Research, Inc.
Atlantic Refining Co.
International Mercantile Marine Co.
National New York Packing & Shipping Co.
Washington, Virginia & Maryland Coach Co.
The Associated Press

(h) As to the interpretation of practices "affecting" commerce, is it not a strange thing that in every single solitary published case decided by the Board it has held that the activities in question "affected" commerce entirely regardless of the business the Company was engaged in (See Commerce Clearing House, Labor Law Service, Paragraphs 15401, 15564).

(i) The magnitude of the organization created by Congress and the enormous funds that it has appropriated to maintain it is an indication that the Act was never intended to apply merely to inter-state commerce (omitting railroads).

We conclude therefore from the above that Congress intended the Act to apply to "intra-state" cases, as the word is used in the present Brief.

Intra-State Cases (Local Manufacturing or Production)

Clinton Cotton Mills
American Commercial Alcohol Co.—American Distilling Co.
United States Stamping Co.
National Casket Co., Inc.
Sands Manufacturing Co.
Baer Silk Throwing Co., Inc.
Fisher Flouring Mills
Fisher Flouring Mills
Beaver Lois Mills
Timken Silent Automatic Co.
Cleveland Chair Co.
Friedman-Harry Marks Clothing Co., Inc.
M. H. Birge & Sons Co.
Columbian Enameling & Stamping Co.
Algonquin Printing Co.
E. R. Haffelfinger Wall Paper Co.
Atlanta Wooden Mills
Greensboro Lumber Co.
Bendix Products Corporation
Harbor Boat Building Co.
Jeffery DeWitt Insulator Co., Inc.
Bell Oil & Gas Co.
Fashion Piece Dye Works Co., Inc.
American Hat Mfg. Co.
Canvas Glove Mfg. Co., Inc.
Anwelt Shoe Mfg. Co.
Ansin Shoe Mfg. Co.
Yale Underwear Co.
Dwight Manufacturing Co.
Oregon Worsted Co.
Santa Cruz Fruit Packing
Canton Stamping & Enameling Co.
Pittsburgh Steel Co.
Protective Motor Service Co., Inc.
The Rubber Co., Inc.
Chrysler Corporation
General Industries Co.
Pusey, Maynes & Breish Co.
Segal-Maigen Co.
Aluminum Company of America
Smith Cabinet Manufacturing Co.
Mesta Machine Co.
Mooresville Cotton Mills
Renown Stove Co.
Bradley Lumber Co. (2 cases)
Utterstrom Brothers, Inc.
C. G. Conn, Ltd.
St. Clair Rubber Co.
Crucible Steel Co. of America (complaint)
Cherry Cotton Mills
Crucible Steel Co. of America (representation)
Robert H. Foerderer, Inc.
S. Cohen & Sons
Wholesale Radio Service, Inc.
Gray-Knox Marble Co. (representation)
Chelsea Silk Co.
Cook Ceramic, Inc.
Kentucky Firebrick Co.
Aluminum Co. of America
Carlisle Lumber Co.
Indiana Textile Mills, Inc.
Robinson & Golluber
Atlas Drop Forge Co.
Louis Hornick Co.
Bemis Brothers Bag Co.
Signal Knitting Mills
Ilena Knitting Mills
Samson Tire & Rubber Corporation
Tucker Oil Co.
Demarest Silk Co.
The Optical Products Co.
Gardner-Denver Co.
Boss Manufacturing Co. (2 cases)
Riverside Knitting Mills
Aluminum Products Co.
Trenton Mills, Inc.
Wellwood-Norwich Silk Mills, Inc.
Club Troika, Inc.
Pacific Mills Co.
S. Gutman & Co., Inc.
American Potash & Chemical Co.
International Harvester Co.
Chicopee Manufacturing Corporation

Interstate Cases or Doubtf

The Associated Press (represe tation)
American Oil Co.
Agwilines, Inc.
Agwilines, Inc.
St. Joseph Stock Yards Co.
D & H Motor Freight Co.
Lykes Brothers—Ripley Stea ship Co.

F. Summary of the object of the act:

The doctrine of "piercing the veil" has already been applied by this Court in the *Schechter* and *Carter* cases. Anyone reading the present Act and considering the Board's application of it will see that its real object is not to regulate inter-state commerce but to set up for social and economic ends a nation-wide scheme for the assistance of labor and the settlement of disputes between Labor and

Intra-State Cases (Local Manufacturing or Production)	*Interstate Cases or Doubtful*
Bemis Bros. Bag Co.	Auth Electrical Specialty Co., Inc.
Lion Shoe Co.	J. Freezer & Sons, Inc.
Lehman Bros. Inc.	Toledo Shipbuilding Co., Inc. (2 cases)
S & K Knee Pants Co.	Quidnick Dye Works
Mann Edge Tool Co. (representation)	Magnolia Petroleum Co.
Mann Edge Tool Co. (complaint)	American Tobacco Co.
Edward E. Cox, Printer, Inc.	Whiterock Quarries, Inc.
Sunshine Hosiery Mill	Fall River Gas Works Co.
Sneath Glass Co.	Fit-Rite Slipper Co., Inc.
Foster Brothers Manufacturing Co., Inc.	Selfast Dress Co.
Axton-Fisher Tobacco Co.	Prudential Knitting Mills
John Blood & Sons Co.	Memphis Furniture Manufacturing Co. (2 cases)
Wallace Manufacturing Co.	Clark & Reid
Gordon Baking Co.	Atlas Mills
Brown and Williamson Tobacco Co.	J. W. Sanders Cotton Mills, Inc.
Ward Baking Co.	Stanley Works Co.
Pioneer Pearl Button Co.	Richards Wilcox Manufacturing Co.
Ralph A. Freundlich, Inc.	Chesapeake Manufacturing Co.
Sommerville Manufacturing Co. —Somerset Mfg. Co.	Clausner Hosiery Co.
Gray-Knox Marble Co.	Nolan Motor Co.
Belmont Stamping & Enameling Co. (complaint)	Schonfield & Reis
Belmont Stamping & Enameling Co.	Boyertown Burial Casket Co.
International Filter Co. (2 cases)	Fisher Body Corporation
	Chevrolet Motor Co.

Of the 180 cases covered by the above tabulation only 20 directly involved interstate commerce, any doubt being resolved in favor of classification as inter-state commerce. The balance, 160 cases, involve local manufacturing concerns. Of course, Petitioner does not contend that these latter companies may not manufacture or produce articles which may not in greater or less degree, or sooner or later, get into inter-state commerce or become part of the stream of commerce. It may be too that inasmuch as this tabulation is made by Petitioner's counsel without access to the official records, some of the cases classified as intra-state may in fact be inter-state cases in the strict sense of the word. The overwhelming majority of them, however, unquestionably are not inter-state cases in the sense that they are cases involving bus companies, steamship companies, pipe line companies, or communications systems. The intra-state companies above referred to are local businesses such as dye works, printers, tobacco companies, building material companies, milling companies, lumber companies, drug companies, leather companies, oil companies; manufacturers of shoes, hats, clothing, liquor, carpets, furniture, radiators, bags, automobiles, textiles, stoves, lamps, beds, paper, food, steel, caskets, glass, rubber, tools, printing presses, etc.

The administrative interpretation of the Act is therefore overwhelmingly in favor of Petitioner's contentions that it was intended to apply to local manufacturing and production. In truth only such an interpretation would give it the slightest chance of achieving the broad results its "Findings of Fact and Policy" shows it aims at.

Capital. The Act had its inception not in the needs of the non-railroad branches of inter-state commerce, (it seems folly to contend it), but in the chagrin of labor unions when this Court in the *Schechter* case held invalid Section 7 (a) of the NIRA Act. Why not admit that the ultimate object of the present Act is to fasten the doctrine of labor unionism, like a State Religion, upon every business in the country with more than two employees? (See Report, Senate Committee on Education and Labor, May 1, 1935). We go further and say that the further object of the Act is even more sinister, namely, compulsory collective bargaining. Section 8 (5) making it an unfair labor practice to refuse to bargain collectively with representatives of the employees is practically the same as compulsory arbitration. Either "bargaining" means offers back and forth leading to a contract or it means nothing. The essence of an offer is that the other party may accept it. If, therefore, a series of offers back and forth prove unacceptable they tend to become progressively lower or more acceptable. As the Act apparently requires the employer to keep on making or receiving offers it follows that the real object and achievement of the Act is a form of compulsory arbitration under the guise of compulsory collective bargaining. It has the added vice of requiring the parties to make a contract, for if collective bargaining is not to lead to a contract it amounts to mere conversation.

G. If the object of the act was to enact a comprehensive scheme to regulate intra-state activities as well as inter-state the act has not been misconstrued but is unconstitutional:

It seems almost incredible to Petitioner that in the face of the plain intention of the Act and its consistent administrative application the Court below came to the conclusion that it was not intended to apply to ordinary intra-state industry and manufacturing concerns. It is signifi-

cant that other Courts have held otherwise. Thus in *Board* v. *Jones and Laughlin Steel Co.*, 83 F. (2d) 98, a case exactly similar to the *Foster Brothers* case, the Circuit Court of Appeals for the Fifth Circuit impliedly held the Act unconstitutional, making no mention whatsoever of any possible misconstruction of the Act by the Board. To the same effect is the decision of the Circuit Court of Appeals for the Sixth Circuit in *Fruehauf Trailer Co.* v. *Board*, 85 F. (2d) 391. To the same effect is the decision of the Circuit Court of Appeals for the Second Circuit in *Board* v. *Friedman-Harry Marks Clothing* Co., 83 F. (2d) 731 and 84 F. (2d) 1000. The District Courts have likewise decided intra-state cases on the basis of unconstitutionality and not construction. Thus in *El Paso Electric Co.* v. *Elliott, et al* (U. S. D. C., Western Dist. Texas) the Court (Judge Boynton) held the Act unconstitutional *in toto*. To the same effect was the decision in *Stout* v. *Pratt*, 12 F. Supp. 864 (W. D. Mo., Otis, J.), wherein the Court stated that it was the "clear intent" of the Act to subject the relations between employers and employees even in small intra-state companies to the control of the Labor Relations Board.

The recent decision of the Circuit Court of Appeals for the Ninth Circuit in *National Labor Relations Board* v. *Mackay Radio and Telegraph Co.* (January 11, 1937), to the effect that the Act herein was intended to regulate inter-state commerce alone seems to beg the question as the Opinion does not consider whether mining or manufacturing "affects commerce" within the meaning of the Act. As construed by the Board intra-state manufacturing activities having any effect at all, however remote, upon inter-state commerce come within the scope of the Act. The constitutionality of any Act of Congress does not arise *in vacuo* but as the particular Act is construed and applied to the particular cases. If, therefore, the Board has consistently construed and applied the present Act to cases of intra-state manufacture on the theory that labor disputes

in such industries affect inter-state commerce, the administrative construction and application of the Act, coupled with the avowed ends and purposes of the Act revealed by the Act itself, constitutes a showing that the Act was really intended to apply to intra-state commerce in the sense that as construed and applied the Act holds most forms of intra-state commerce really inter-state commerce.

It would seem from the above that the Board has not really misconstrued the Act but has taken the plain mandate of Congress at its face value, which is to regulate all industry with reference to labor relationships. If so, the Act has not been misconstrued by the Board but is unconstitutional in respect to the regulation of intra-state industry.

H. The proof that the act is unconstitutional as to intra-state industry:

As to this, in order not to burden the Court and duplicate the arguments of other counsel in the companion cases herein, counsel for Petitioner respectfully request the Court to consider as Petitioner's argument the various arguments made in the companion cases herein relative to the unconstitutionality of the Statute as applied to intra-state industry. It seems more fitting to counsel that such arguments should be considered in connection with the concrete facts of the particular cases which have arisen. We feel confident that, bearing in mind the late Mr. Justice Holmes' admonitions in the *Northern Securities Case,* 193 U. S. 197, 402, and the remarks of the present Chief Justice in the *Schechter Case,* the Commerce Clause can never be extended to cover the regulation of intra-state industry no matter what "the distant repercussions" may be.

I. Under this court's decisions on separability the entire act is unconstitutional.

As already stated the question in the present case may be viewed from the standpoint either of statutory construction or inseparability. In other words, either the Act was not intended by Congress to apply to Petitioner if its all-inclusive application to intra-state commerce is destroyed, or the Act is unconstitutional in the sense that being unconstitutional as to intra-state commerce it is unconstitutional as to everything, there being no way to disentangle one aspect of the Act from the other. From the latter viewpoint it is submitted that under this Court's decisions on separability the Act is unconstitutional as a whole.

At the outset counsel for Petitioner find it difficult to perceive how this Court can ever adapt the machinery of the Act to a different object than the object revealed by the Act itself. If, therefore, the object of the Act is the regimentation of *all industry,* intra-state as well as inter-state, with respect to the relationships of employer-employee, the application of the Act by judicial excision to interstate industry alone constitutes the application of the Act to a different object than that intended by Congress. The Statute, by judicial construction, would be put to a use not intended by Congress when it was enacted. It is submitted therefore, initially, that the Courts do no service to Congress by holding constitutional a Statute piece-meal when the object of the Statute as a whole is different from the object of the Statute in its constitutional part.

Back of every Statute is a purpose. If the purpose of the present Statute is to regulate industry as a whole, with respect to labor relations, is this purpose effected by ekeing out through judicial construction a regulation of only a hundredth part of industry? In this connection, it must not be forgotten that the object of the Act is not, at least ostensibly, to encourage labor unions for the purpose of

preventing strikes, but the prevention of strikes because of their effect upon the general economics of the country.

It is difficult to perceive how the prevention of strikes in bus companies, even in the additional industries regulated under the Packers and Stockyards Act and the Grain Futures Act, would prevent the evils so roundly denounced in the "Findings and Policy". In this aspect this Court's decision in the *Trade-Mark Cases*, 100 U. S. 82, seems very close to the present state of facts. In these cases there was before the Court a Statute covering the registration generally of trade-marks without being restricted to trade-marks used in inter-state commerce. An indictment for a violation of the Statute was before the Court. The Court considered the Power of Congress to enact the Statute, tracing it solely to the Commerce Clause. The Court said:

> "When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the statute, or from its essential nature, that it is a regulation of commerce with foreign nations, among the several States, or with the Indian Tribes. If it is not so limited, it is in excess of the power of Congress. *If its main purpose be to establish a regulation applicable to all trade, to commerce at all points, especially if it is apparent that it is designed to govern the commerce wholly between citizens of the same State, it is obviously the exercise of a power not confided to Congress.*" (*United States* v. *Steffens*, 100 U. S., at page 97. Italic ours).

The Court then held that the Act made no distinction between trade-marks used in inter-state commerce and trade-marks involving intra-state commerce alone. The Court said:

> "It is, therefore, manifest that no such distinction is found in the Act, but that its broad purpose was to establish *a universal system* of trade-mark registration, for the benefit of all who had already used a trade-mark, or who wished to adopt one in the future, without

regard to the character of the trade to which it was to be applied, or the locality of the owner." (*United States* v. *Steffens*, 100 U. S. at page 98. Italics ours).

The Court then considered the argument of separability, namely, that even though the Statute was unconstitutional as to intra-state trade-marks it could be held constitutional as to trade-marks used in inter-state commerce. As to this the Court said:

"While it may be true that when one part of a statute is valid and constitutional and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body." (*United States* v. *Steffens*, 100 U. S. 99).

It is submitted that the quotations above seem applicable almost word for word to the present Act. The object of the Trade-Mark Act was, as the Court said, "to establish a universal system of trade-mark registration". Similarly, the object of the present Act is to establish a universal system regulating labor relationships throughout the whole country. Just as in the Trade-Mark cases this Court held it could not salvage a part of the Act when the universal application of the Act would be unconstitutional so we submit in the present case it cannot sustain the Act as to the few remaining branches of inter-state commerce.

Nor is the force of the Trade-Mark decision destroyed by the fact that the Court was dealing with a criminal offense, and that, in its own words:

"It is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language

> that brings them within the constitutional power of that body."

There is no difference in principle between the creation of civil liabilities in the present Statute (in the form of unfair labor practices) and the criminal offenses set forth in the Trade-Mark Statute. If, therefore, in the Trade-Mark Act this Court could not read into the "universal system" a limitation in favor of inter-state commerce it follows that it cannot read into the "universal system" in the present Act a limitation in favor of inter-state commerce. The real reason, it seems to us, is that this Court cannot reframe the *object* of the Act. In this respect the present Act is far clearer than the Trade-Mark Act. In the Trade-Mark case this Court was compelled to glean the "universal system" from the Act itself which was an old-fashioned piece of legislation without any findings of fact and policy. But in the "Findings and Policy" of the present Act there is the clearest possible indication of the universal system the Act was intended to put into effect.

Similar to the Trade-Mark Cases and cited by this Court in its decision is *United States* v. *Reese*, 92 U. S. 214, wherein this Court considered a Statute punishing election officers for refusing to any person the right to cast his vote at an election. This Court held that Congress could only punish such an offense when the refusal was on account of race, color or previous condition of servitude. It was urged that the more general description of the offense embraced the particular aspect "on account of race, color, etc.", and that the Section was valid when *in fact* the denial was on account of "race, color, etc.". But this Court held otherwise, stating:

> "We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is constitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out

> or disregarding words that are in the section, but by inserting words that are not there now. Each of the sections must stand as a whole or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. • • • To limit this statute as now asked for would be to make a new law, not to enforce an old one. This is no part of our duty." (*United States* v. *Steffens*, 100 U. S. at page 99).

As this Court said in the Trade-Mark cases:

> "If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do, namely: make a trade-mark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances under the Act of Congress, and in others under state law. Cooley, Const. Lim., 178, 179; *Com.* v. *Hitchings*, 5 Gray, 482." (*United States* v. *Steffens*, 100 U. S. at page 99).

The above seems expressly applicable to the present case. It is no answer to quote the separability provision of Section 15 of the present Act and to argue that Congress in this provision indicated its wish that if the Act was unconstitutional as to intra-state labor relations still it should be held applicable to labor relationships of employers and employees engaged in inter-state commerce. This overlooks, as already said, the *object* of the Act shown by the "Findings and Policy". But in addition, it makes the "Findings and Policy" repugnant to the Act itself. What possible reference can Section 1 (c) of the "Findings and Policy" to the effect that the denial of collective bargaining materially affects, restrains and controls the flow of raw materials or manufactured goods in the channels of

commerce, have to bus companies devoted entirely to passenger service? Or what can be the relationship of Section 1 (d) of the "Findings and Policy" as to the effect that the refusal to accept the procedure of collective bargaining causes diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing in inter-state commerce? We say nothing further on the statement in the "Findings and Policy" that inequality of bargaining power (in bus companies, for instance) tends to aggravate recurrent business depressions.

It seems clear from the above that if the separability argument is to be applied to the present case the Court must not only prune away the application of the Act to intra-state commerce but physically cut the "Findings and Policy" right out of the Act.

This Court's decision in *Hill* v. *Wallace*, 259 U. S. 44, 70, supports Petitioner's present argument. In that case this Court held unconstitutional Section 4 of the Future Trading Act imposing a tax upon a Board of Trade failing to comply with the regulations proscribed under Section 5 of the Act. The Court held this tax was not in truth a tax but that it was designed to coerce the Board into compliance with Section 5 containing the regulations. Although the Act contained a Separability Clause similar to the present Act this Court held that the regulations contained in Section 5 fell with the tax contained in Section 4, the one being "interwoven" with the other. In other words, this Court held that everything in the Act the object of which was to subject Boards to regulation by the Secretary of Agriculture was unconstitutional. We contend the same reasoning is applicable to the present Act; that everything in it designed to accomplish the broad purposes outlined in its "Findings and Policy" is likewise unconstitutional if the Act, because of its unconstitutional intra-state regulation is incapable of achieving the object of the Act.

This Court's decision in the *Employers Liability Cases*, 207 U. S. 463, 500-504, likewise supports Petitioner's present

argument. In that case the Court was asked to limit the application of the Act which applied broadly to injuries received in both intra-state and inter-state commerce to the latter alone. The Court held it could not do this, stating that it was "unable to say that the statute would have been enacted had its provisions been restricted to the limited relations of that character which it was within power of Congress to regulate," and citing in this connection the *Trade-mark Cases*, 100 U. S. 82. In the present case it appears clearly from the "Findings and Policy" of the Act that Congress would never have passed the Act to regulate the unregulated portions of inter-state commerce, such regulation being utterly incapable of achieving the object of the Act revealed by the Act itself in its "Findings and Policy".

The test applied by this Court in *Butts* v. *Merchants Transportation Co.*, 230 U. S. 126, 133-138, as to whether the Civil Rights Act, held unconstitutional as to the States, applied to the coastal waters within the exclusive jurisdiction of the United States was as follows:

> Where the greater part of a statute is unconstitutional as beyond the power of Congress, the question for the Court to determine as to the part which is constitutional is whether it was the intent of Congress to have that part stand by itself—if not the whole statute falls.

This Court when the case came before it had already decided the *Civil Rights Cases*, 109 U. S. 3 holding the Civil Rights Act unconstitutional as to the States. It was contended in the Butts case that although this was so the Act applied to the District of Columbia, the territories and the coastal waters. This Court held that Congress never intended such a limited application of the Act and reached this conclusion on the basis of the very argument Petitioner in the present case now puts forward, i.e., on the basis of the object of the Act as set forth in the Act itself. Just

as the object of the present Act is entirely incapable of being attained by restricting the application of the Act to inter-state commerce so in the Butts case the object of the Act was likewise entirely incapable of being attained by restricting it to territory under the exclusive jurisdiction of the United States. It is significant that in the Butts case this Court turned to the preamble of the Act as proving it, quoting it as follows:

> "Whereas, it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law." (*Butts* v. *Merchants Transportation Co.*, 230 U. S. 131.)

The only difference between the Civil Rights Act as applied in the Butts case and the present Act in the present case is that in the Butts case there was a geographical restriction of the Act whereas in the present case the restriction relates to a portion of industry, i. e., intra-state commerce. This, however, does not constitute a difference in principle.

Baldwin v. *Franks*, 120 U. S. 678, 685, is likewise in favor of Petitioner emphasizing, as it does, the difference between construction and separation. While it concedes the unquestioned rule that statutes may in part be constitutional and in part unconstitutional, and the constitutional part may be enforced if severable from the unconstitutional part it indicates this is not to be achieved by separating the two parts by reading into the statute a construction in favor of the so-called constitutional part. This is precisely what the Government would have this Court do in the present case. The Act herein has, strictly speaking, no separable parts, i.e., one part relating to intra-state cases, and the other to inter-state. What the Government asks this Court

to do is, if the Act is unconstitutional as to intra-state cases, to construe it to apply to inter-state cases alone. Again going back to the object of the Act as expressed in the "Findings and Policy" we say such a construction is unwarranted, just as unwarranted as the limited construction contended for but refused by this Court in *United States* v. *Reese, supra,* the *Trade-Mark Cases, supra,* and *Butts* v. *Merchants Transportation Co., supra.*

In *James* v. *Bowman,* 190 U. S. 127, 140, this Court had before it the question of the constitutionality of a statute punishing the prevention by bribery of the exercise of the right of suffrage by a person to whom that right was guaranteed by the Fifteenth Amendment. It was contended that the defendants violated this statute. The Court held that from the wording of the statute it was only intended to apply to cases arising under the Fifteenth Amendment and not to elections generally. The Court said:

> "To change this statute, enacted to punish bribery of persons named in the Fifteenth Amendment at all elections, to a statute punishing bribery of any voter at certain elections *would be* in effect judicial legislation. *It would be* wresting the statute from the purpose with which it was enacted and making it serve another purpose." (*James* v. *Bowman,* 190 U. S., p. 140, Italics ours.)

This case is important as it shows that this Court has always, upon the question of separability, considered the *purpose* of the statute. Impliedly this case and others hold that there can be no judicial announcement of separability if the enforcement of the constitutional part of the statute would change the purpose of the statute. Evidently, therefore, this Court considered that it was powerless, under the guise of separability, to put part of a statute to a purpose different from the purpose given in the statute itself even though Congress apparently was willing to take anything it could get. In other words, this Court repudiated

the specious argument that half a loaf would be better than no bread at all when it turns out, as here, that half a loaf would not be bread but a stone of altogether different substance.

To the same effect is the decision of this Court in *Illinois Central R. Co.* v. *McKendree*, 203 U. S. 514, 529, holding that an order of Secretary of Agriculture applying to both inter-state and intra-state commerce could not be limited to the constitutional application to inter-state commerce. This Court said:

> "We do not say that the state line might not be adopted in a proper case, in the exercise of Federal authority, if limited in its effect to interstate commerce coming from below the line, but that is not the present order, and we must deal with it as we find it. Nor have we the power to so limit the Secretary's order as to make it apply only to interstate commerce, which it is urged is all that is here involved. For aught that appears upon the face of the order, the Secretary intended it to apply to all commerce, and whether he would have made such an order, if strictly limited to interstate commerce, we have no means of knowing. The order is in terms single and undivisible." (*Illinois Central R. Co.* v. *McKendree*, 203 U. S. p. 529.)

Williams v. *Standard Oil Company*, 278 U. S. 340, 341, 342, emphasizes the impossibility of changing the purpose of a statute. In that case the Court held invalid a portion of a statute fixing the sale price of gasoline and held that the remainder of the statute providing for the creation of a commission, the collection of data, etc., creating mere adjuncts to the main purpose of fixing prices was likewise invalid. This Court quoted with approval Mr. Justice Pitney's statement in *Riccio* v. *Hoboken*, 69 N. J. L. 649, 662 condemning judicial mutilation of a statute and holding that the preservation of valid parts of an Act was only possible where the removal of the unconstitutional features would "leave the constitutional features and *purposes* of the Act substantially unaffected by the process".

To the same effect is this Court's decision in *Railroad Retirement Board* v. *Alton Railway Co.*, 295 U. S. 330, 362, wherein this Court referred to the separability provision in the Act declaring that it merely reverses the usual presumption. This Court continued:

> "But notwithstanding the presumption in favor of divisibility which arises from the legislative declaration, we cannot rewrite a statute and give it an effect *altogether different from that sought by the measure viewed as a whole.*" (Italics ours)

After referring to the unconstitutional provisions this Court continued:

> "They so affect the dominant aim of the whole statute as to carry it down with them".

We submit this is precisely the situation in the present case: the unconstitutional intra-state provisions so destroy the dominant aim of the present statute as to leave not "the bone and sinew" of the Act but merely minor skeletal remains.

To the same effect as the above cases is *United States* v. *Harris*, 106 U. S. 629, 641.

This Court's decision in *Carter* v. *Carter Coal Co., supra,* on the question of separability supports the argument above made. In that case there was a far better argument for separability than in the case of the present Act because the Bituminous Coal Conservation Act shows a clear dichotomy between the labor provisions of the Act and the price fixing provisions. The Act was even physically divided into two parts, one of which, if the separability argument had any weight, would have seemed equally as constitutional as the other was unconstitutional. This Court however applying the test of legislative intent shown by the terms of the Act itself in its preamble and on the basis of the inter-dependence of the *means* provided by the Act for achieving the end contemplated held the provisions of the Act in-

separable, and hence held the Act unconstitutional. In the present case if the means are unconstitutional with respect to the Fifth Amendment insofar as so-called intra-state commerce is concerned they are likewise unconstitutional insofar as inter-state commerce is concerned. But, from the viewpoint of inseparability, it is not so much the means we are now concerned with: it is the end or object of the Act disclosed by the Act itself. If that object is the suppression of evils in so large a part of industry that such evils "substantially burden and affect the flow of commerce and tend to aggravate recurrent business depressions", (Sec. 1), and if the Act is unconstitutional as construed and applied to nine-tenths of industry, the question arises whether it can be held constitutional as applied to the other one-tenth, or whether the test referred to in the Carter case and other cases, i.e., whether Congress would have passed the Act to apply to bus companies and the few forms of inter-state commerce other than the railroads, does not apply. We submit that if in the Carter case this Court cannot reconstruct the means to achieve a given end it cannot, in the present case, sustain the diversion of the Act to achieve an end entirely different from the end contemplated by Congress in enacting it. In other words, we contend that if the Act as applied to the few bus companies, communications systems, etc., remaining over after the Act has been eliminated as a regulation of industry in toto would constitute a mere internal regulation of these companies without any general effect upon inter-state commerce and without achieveing in any way the object of the Act, such construction is unjustified, and the Act in its entirety must fall.

CONCLUSION.

It is submitted that the judgment below should be reversed:

(1) On the ground that the Record does not sustain the findings of the Board that Petitioner was guilty of an un-

fair labor practice within the meaning of Section 8 of the Act, in which case it becomes unnecessary for this Court to consider the constitutional question;

(2) In the event that the factual question should be determined adversely, it is submitted the Act is unconstitutional as in violation of the First, Fifth and Seventh and Tenth Amendments as applied to inter-state commerce;

(3) In the event that the Act is declared unconstitutional as to local industry or manufacturing concerns the Act is unconstitutional as applied to inter-state commerce, the latter application being inseparable from the former according to the object of the Act as shown by the Act itself.

Respectfully submitted,

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